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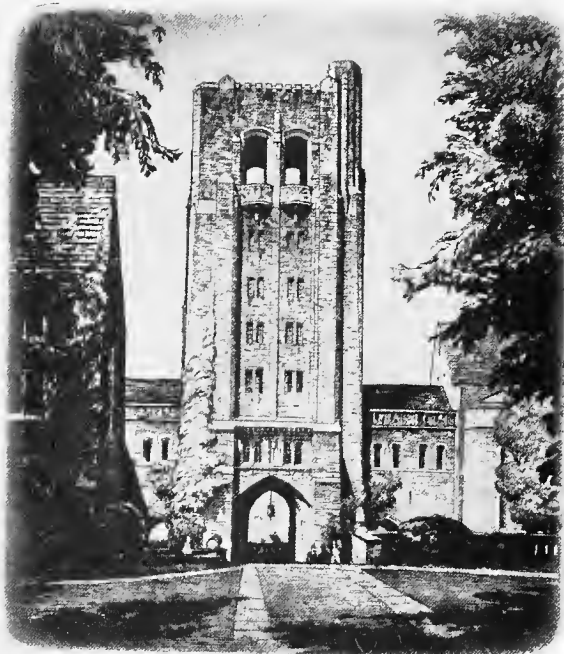
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A PRACTICAL EXPOSITION
OF THE
PRINCIPLES OF EQUITY,
ILLUSTRATED BY THE
LEADING DECISIONS THEREON.
FOR
Students and Practitioners.

BY
H. ARTHUR SMITH, M.A., LL.B. (LOND.)
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW:

SECOND EDITION.

LONDON:
STEVENS AND SONS, 119, CHANCERY LANE,
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1888

LONDON :

PRINTED BY C. F. ROWORTH, GREAT NEW STREET, FETTER LANE.

PREFACE TO THE SECOND EDITION.



MORE than six years having elapsed since the first appearance of this work, the labour of incorporating therein the intervening legislative changes has been considerable. One needs only to refer to the Married Women's Property Act, the Conveyancing Act, 1882, the Bills of Sale Act, 1882, and the last Bankruptcy Act, to show how necessary an exhaustive revision had become. Moreover, such has been the extreme industry of the law reporters that the addition of something like a thousand new cases has been found necessary for the purpose of keeping practitioners in touch with the latest judicial decisions.

Certain new features in the work should perhaps be specifically mentioned. In consideration of the prominence given by many examiners to the Maxims of Equity, it has been thought desirable to add to the Introductory Chapter an analysis of the best known of these aphorisms. The author remains convinced of the inexpediency of taking the student into copious illustration thereof at such an early stage in his course. After the attainment of a general acquaintance with the subject as a whole, an intelligent use of the Index under the head "Maxims" will enable him to compile

for himself a list of illustrations of each, complete enough for any practical purpose.

The Chapter on Trusts has been enlarged by the addition of a section on the Remedies of a *cestui que trust*.

The changes effected by the Married Women's Property Act has necessitated an entire re-casting of that portion of the work. The consequential diminution in importance of the purely equitable principles affecting married women has warranted a curtailment of the space devoted to them; and, in order to present a complete view of the subject, a summary of the Act itself has been appended.

A still more important addition will be found in the chapter on Company Law, a subject not hitherto, as far as the author is aware, treated of in text books on Equity, and yet one which so copiously illustrates the application of equitable principles and requires the aid of equitable procedure, that an apology can scarcely be needed for what is, perhaps, a technical inconsistency.

For the preparation of this chapter, and for other very material assistance in the preparation of this edition, the author thankfully acknowledges his indebtedness to Mr. GEO. H. POWELL, of the Inner Temple.

H. A. S.

1, NEW SQUARE, LINCOLN'S INN,
June, 1888.

PREFACE TO THE FIRST EDITION.

IN the course of his own reading for law examinations, and in directing the studies of others, the author has often experienced a difficulty in distinguishing between the principles of law and equity for the time being in force, and doctrines which have been rendered obsolete by the course of recent decisions or the current of legislation; and he has observed that this difficulty is often traceable to the fact that though the standard books in use have, whilst passing through their many editions, recorded the bare results of changes, yet no attempt has been made to modify accordingly the general outline and classification of the subject.

Another frequent difficulty has been to meet the requirements of examiners by establishing a clear association of leading principles with leading cases. It is indeed true that many works designed to effect this object are before the public, all, as far as equity is concerned, deriving their inspiration from the invaluable work of Messrs. White and Tudor. But this work, to which almost all living writers on the subject must acknowledge their obligations, is too voluminous for convenient use by students, and, moreover, it makes no pretension to a classification of its admirably selected cases, or to any systematic exposition of the principles of equity. The other works referred to are, on the contrary, all of them too small and elementary to be relied on alone. Readers have, therefore, been compelled to refer to one book as their main informant on their subject, and to another as a means of cementing the association between its leading doctrines and its leading decisions.

It has been the author's especial design in the preparation of this work to meet both these difficulties. With respect to the former of them, such an effort has been rendered all the more necessary by the extensive and radical change which was effected by the Judicature Acts of 1873 and 1875. Not only is detailed

reference to the provisions of these statutes necessary under almost every branch of the subject, but the fusion of equity and law thereby effected demands a fundamental change in the general classification and division thereof. It is evidently no slight advantage to the reader to have before him a classification based on existing conditions, rather than one which, having been devised under very different circumstances, has been from time to time corrected and modified in an unsystematic and disjointed manner.

But besides these statutes of supreme importance, there are many others which, not being retrospective, have introduced new law without rendering the old obsolete. In such cases the student has to learn two sets of doctrines, one of which is applicable to one set of cases, another to another. In order to avoid confusion in these circumstances the author has been careful to indicate the difference by the use of appropriate tenses, as well as by marking the change conspicuously in the division of the various chapters and sections. This may be illustrated by reference to the recent Real Property and Conveyancing Act (1881), the provisions of which, so far as bearing upon the matters discussed, have been fully set out.

With the view of bringing important leading cases prominently before the eye of the reader, they have been conspicuously printed under their respective headings. The selection of Messrs. White and Tudor has been followed in the main, as not only being excellent in itself, but as being familiarly known by the profession, and more or less so by all who have entered upon the study of equity. It has, however, been supplemented by many additional cases bearing on matters not treated of by those learned authors.

It is hoped that the designs thus attempted will prove to have been accomplished, at least to a sufficient degree to confer some benefit upon the present and future members of the profession.

H. A. S.

1, NEW SQUARE, LINCOLN'S INN,
January, 1882.

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THE PRINCIPLES OF EQUITY.

INTRODUCTION.

- I. *Design of the Work.*
- II. *Division of the Subject.*

I. THE design of this work is to present within moderate dimensions as complete a view of English equitable jurisprudence as is necessary for meeting the requirements of the examinations in this subject, and for a clear understanding of the cases which most frequently present themselves in the practice of the profession. Design of the work.

For this purpose it has not been deemed necessary to enter into the attractive subject of the history of equity. To do this effectively would require more space than could well be spared in a work of moderate dimensions, the contents of which must necessarily extend over a wide field of inquiry; and to attempt to compress so extensive a subject within very narrow limits would perhaps be worse than useless. Occasionally, indeed, something in the nature of an historical retrospect is necessary for the explanation of certain features of the jurisprudence; and in these cases—for instance, in introducing the subject of trusts—we have, as concisely as has seemed to us consistent with clearness, narrated the steps by which the jurisdiction has become established. Such glances at history, however, are only introduced as ancillary to the comprehension of the principles concerned, and are not designed

Not historical.

s.

B

to serve the purposes of those who desire to be well informed respecting the origin and growth of the jurisdiction of the Court of Chancery.

Classification
and division
of the subject.

II. It is a truism to say that a treatise designed as an exposition of so complex and intricate a subject as equitable jurisprudence requires to be systematic in form. Its multitude of details can only be brought within the grasp of an ordinary memory by means of a most careful classification. Yet to devise a system of classification which shall be at once logical, adequately comprehensive, and simple, is a problem of no slight difficulty; and scarcely two writers have agreed in its solution.

Story's division
obsolete.

The division which is perhaps most familiar to modern students is that of Story, which distinguishes between the concurrent, the exclusive, and the auxiliary jurisdiction of the Courts of equity. It would be a presumption to praise or criticise the conclusion of so great a writer, and it argues no disrespect for it that it is not here followed. Owing to the legislation which has recently remodelled our whole judicial system, such a sub-division of the subject, however excellent at the time at which it was devised, is no longer sufficiently exact to be satisfactory.

Jud. Act,
1873, ss. 24,
25, 34.

It is undoubtedly true that by the provisions of the Judicature Act certain matters are specifically assigned to the various divisions of the whole administrative machinery now described as the High Court of Justice, and it is equally true that in fact certain business and certain classes of actions are, for reasons of obvious convenience, confined respectively to the Chancery, the Probate, and the Queen's Bench Divisions. Yet to adopt terms employed to indicate the relations which existed between the old Court of Chancery and the old common law Courts as headings of the subject of the modern administration of equity, is to assign too great an importance to distinctions, which, though in fact still existing in practice, are in point of principle and in theory altogether abolished.

The most important enactment of the statute above mentioned is to the effect that (a), "in every civil cause " or matter commenced in the High Court of Justice law " and equity shall be administered concurrently, and that " whenever there is a conflict between the rules of common " law and those of equity, the rules of equity shall " prevail."

A terminology, therefore, which suggests that equity cannot, under existing arrangements of procedure, be administered except in the Chancery Division, is clearly an anachronism, and to some extent misleading. Indeed, that the special assignment above alluded to does not establish anything that can be called in accurate language an *exclusive* jurisdiction, is clear from the emphatic *dictum* of so high an authority as the late Master of the Rolls, that "all the judges of the High Court have the same " jurisdiction; and it is clear that any judge may, if he " chooses, when an action has been brought in the " wrong division, retain the action and exercise the jurisdiction" (b).

Similarly, it may be said that the consideration of what was called the *auxiliary* jurisdiction of Courts of equity as such is chiefly of historical interest. Formerly there were many cases in which, though the common law remedies were sufficient, and the jurisdiction of Courts of common law was accordingly exclusive, yet it was necessary for one of the parties to have recourse to equity in order to procure requisite evidence for the successful assertion of the legal right. The jurisdiction of equity in these cases rested on the peculiarities of its procedure, and extended no further than was necessary to enable the party to maintain his position at law. The most important illustration of this branch of the jurisdiction was afforded by the stringent powers of equity to enforce discovery.

Auxiliary
jurisdiction.

(a) 36 & 37 Vict. c. 66, ss. 24, 25.

(b) *Pinney v. Hunt*, 6 Ch. D. 98, 100, 101; and see *Bradford v. Young*, 26 ib. 656.

But the Judicature Acts having established a system of procedure common to Courts of law and to those of equity, giving to the former identically the same powers as are enjoyed by the latter, it can no longer be necessary for any one whose action lies at law to seek for any preliminary or auxiliary aid in equity.

Not only, moreover, is the division of equitable jurisdiction into exclusive, concurrent, and auxiliary now obsolete, but we may perhaps venture to remark that at the best it somewhat tended to confuse the student, by treating as co-ordinate matters of substance and matters of form; placing side by side as correlative divisions of the subject titles so incongruous as trusts and injunctions, mortgages and interpleaders.

Law and equity still distinct.

Yet, notwithstanding the fusion of law and equity which has by the Judicature Acts been in a great measure effected, the distinction between the two systems must still, for many purposes, be regarded. As long, at least, as the terms law and equity are contrasted by examiners, the student must continue to contemplate them as distinct. And further than that, notwithstanding their present concurrent *administration*, the distinction remains substantial and real. The differences between legal and equitable estates and interests and principles continue to exist, and to produce most important results; so that if we were to cease to indicate the contrast by the terms "legal" and "equitable," we should have to invent others for the purpose (*b*).

Accordingly it has been found repeatedly necessary for the purposes of classification to refer separately to the treatment of questions by law and by equity, and in other respects to contrast the two systems. It would have been tedious in every such case to remind the student of the provisions of the Judicature Acts: it suffices once for all to call attention most emphatically to the change.

Cross-divi-

It is perhaps impossible in dealing with such a subject

(*b*) See *Joseph v. Lyons*, 15 Q. B. D. 280.

as equity to avoid cross-divisions. The principle of trusts, for instance, reaches to almost all parts of the jurisdiction. The whole subject of mortgages might be treated as one sub-division of it; the remedies for fraud largely operate through its application; the law respecting married women and infants continually makes reference to it; and yet it would be obviously absurd in writing of equity not to treat such matters as mortgages and the separate estate of married women under completely distinct titles. A mutually exclusive classification of the subject-matter of equity must not, then, be expected. The best that can be done is to lay hold of the leading distinctions between the various branches of the jurisprudence, and in the separate investigation thereof to clearly indicate their relation one to another.

Story has sub-divided his heading of concurrent jurisdiction into two branches, the one where the *subject matter* constitutes the principal ground of the jurisdiction; the other where the *peculiar remedies* administered in equity constitute the principal ground of jurisdiction (*c*). Under the changed circumstances above referred to, which have made all equitable jurisdiction concurrent, this now commends itself as an exceedingly apt and expressive division of the whole subject. It will be observed that it coincides with Bentham's famous division of law into substantive and adjective law. Though it will often, and indeed generally, be seen that the distinctive principles and the distinctive remedies of equity have acted in combination in establishing the various branches of its jurisdiction, yet the contrast between those matters in which the substantive doctrines of equity form the most conspicuous feature, and those in which the peculiarities of its procedure are most prominent, is sufficiently marked to form the groundwork of a scientific classification of the whole jurisprudence.

sions unavoidable.

Distinction between the jurisdiction founded on difference of substantive principle, and jurisdiction founded on peculiar remedies.

Adopting this as our main division, the work naturally divides itself into two parts. Part I. will comprise those

Adopted.

(c) See Story's Eq. Jur. preface, and s. 77.

subjects the jurisdiction of equity respecting which originated in, or chiefly rests on, a substantive difference between its principles and those of the ancient common law. Part II. will comprise those branches of the jurisdiction which have arisen chiefly from the peculiarities of its procedure or remedies.

PART I.

WHERE THE JURISDICTION RESTS ON THE DISTINCT SUBSTANTIVE PRINCIPLES OF EQUITY.

INTRODUCTION.

- I. *Meaning of the word "Equity."*
 - II. *Distinction between Equity and Law.*
 - III. *Analysis of the Maxims of Equity.*
-

I. *Meaning of the word "Equity."*

To glance for a moment at the first principles of juris- Justice.
prudence, justice, as we learn from the Institutes of
Justinian, consists in the rendering to every man of his
rights (a).

In this large sense we find the word "equity," which Equity:
is hardly in current use in the present day, employed, for its popular
example, in the Bible, as equivalent to justice, and opposed meaning.
to "iniquity." It is, of course, only in a much narrower
sense that the term, juristically applied in modern times to
designate the principles which guide the Court of Chancery,
must be understood. The layman, when he speaks of a
decision or a transaction as inequitable, probably means in
most cases that though there may be no legal remedy

(a) "*Justitia est constans et per-
petua voluntas jus suum cuique tri-
buendi*" (Inst. I. 1). In form,

however, this is a definition of the
moral feeling or quality of the just
man.

open to him, he feels that before some higher and more perfect tribunal he would be held entitled to relief.

Popular language, therefore, generally a safe guide, exhibits the conception of equity as the *helpmeet or complement of law*; and also as the expression of *higher and more perfect principles of justice*. And this is, undoubtedly, the first aspect of the features of equity to which the student's attention should be directed.

II. *Distinction between Equity and Law.*

This familiar aspect of what may be called the more sympathetic administration of justice, of the principles, that is to say, which are invoked to mollify or to modify, in view of exceptional circumstances, the hard and fast rules of law, may be illustrated from the occasional infractions and relaxations to which all human ordinances must be liable. Law commands that the schoolboy shall learn so many verses for his evening task; equity, satisfied that he has a head-ache, excuses him half of them. The two principles, it is true, might be, and indeed often are, explicitly provided for in one code, but none the less is there an essential difference between them; the one dealing rather with the exceptional and the abnormal, and being less capable of exact definition, because it is ever adapting itself to the various devices and the various needs of human nature; the other, absolute, sweeping, not contemplating exceptions or relaxations which are not "in the bond," and from its nature, even where it is not already set down in the enactments of the legislature, more susceptible of definition in black and white.

The growth
of equity.

History seems to indicate that the natural course in the establishment of a juridical system is to begin with rigid and comprehensive rules, and to leave the correction of the occasional anomalies or hardships to be separately dealt

with afterwards; and although the two administrative systems employed will in their maturer development tend, the one to overtake, and ultimately to coincide with the other, yet the difference between the principles we are describing is quite unaffected by the fact that the more settled doctrines of equity are continually crystallizing into the form of written or unwritten law.†

A distinction precisely analogous to that which we *Jus naturale*. observe in our own legal system presents itself in the Roman jurisprudence, upon which so much of our own is founded; between law, that is, as embodied in the Twelve Tables, the *Plebiscita*, and the *Senatus-consulta*, and the principles which guided the more elastic administration of the prætorian tribunal. These latter were elaborated and applied according to Papinian "*adjuvandi vel supplendi, vel corrigendi juris civilis gratiâ*" (b); and the "*jus gentium*" which the Prætor claimed to administer, and in accordance with which his edicts were framed, was but, as Sir Henry Maine has explained, a peculiar aspect of the *jus naturale*,—the law of nature and reason, to which all men appeal from the technicalities and imperfections of conventional systems. And as a matter of history there is no doubt that a similar spirit actuated our earlier chancellors in the establishment of the principal branches of English equitable jurisprudence. We find them referring to the writings of Moses and the prophets in just the same spirit, and for just the same purpose, as the prætors referred to the Stoic philosophers of Greece (c).

The next question will naturally be, how far and to what extent equity is to be regarded as supplementing the defects and correcting the imperfections of law; and this requires a more detailed answer.

In the first place, it is obvious that neither equity by *The limits of* itself, nor law (distinctively so called) by itself, nor even *equity*.

(b) Dig. I. 1. 7.

(c) See Lord Ellesmere's judgment in *The Earl of Oxford's Case*,

1 Ch. Rep. 1; 2 W. & T. L. C. 590.

both together, can make any pretence of covering the whole sphere of that ideal justice, which could only be treated as a branch of morals, but are confined in their working to certain very intelligible limits.

On the one hand, there will always exist injuries and details of right and wrong, which are too insignificant to be noticeable: "*De minimis non curat lex.*" In another case, for reasons of public policy the most conscientious administrator of justice must decline, for example, to afford to an injured party a remedy which he has been slow to demand, for a wrong which he has for a long time regarded with apparent indifference: "*Vigilantibus non dormientibus æquitas subvenit.*" And other limitations of a similar kind will occur, in the course of his reading, to the reflective student.

But within the sphere of practical jurisprudence, the administration of justice outside which is left to the influences of religion, morality, and self-interest, the whole ground is covered by, though by no means exactly apportioned between, the comparatively rigid principles of law and the more elastic principles of equity.

What is meant by the application to the latter principles of such epithets as "elastic" and "conscientious," and what is the practical effect of the distinctions between law and equity, will best be shown by a review of what are called "*The Maxims of Equity.*"

III. *Analysis of "The Maxims of Equity."*

It is necessary to premise that these do not, any more than more popular aphorisms, express in each and every case an exhaustive statement of some independent truth. On the contrary, like proverbs, the bearing of them lies to a great extent in their application, and to apply them unskilfully would be to deduce absurd and incongruous results.

The scope of the maxims.

Their relative importance, again, is by no means equal, and the ground which they respectively cover differs both in nature and extent. Without some premonitory warning of this kind, the student might be startled to find the plain meaning of certain maxims absolutely contradicted in practice;—an anomaly which he may think has been slurred over or ignored in a text-book, which presents them as an irregular codification of equitable jurisprudence, and not as a collection of rough definitions of interdependent doctrines. An obvious illustration of this is furnished by an aphorism which will in its place be more fully discussed—"*aequitas sequitur legem*," "equity follows the law." Now if equity always followed the law, no separate consideration of the two subjects would be necessary; whereas, in fact, the conflicting nature of the two principles is expressly recognized in the section above quoted of the Judicature Act. Accordingly we frequently find under this heading examples given of cases in which equity distinctly *overrides* the law. But it is clear that the chief use of the maxim is to anticipate a hasty generalisation on the part of the student to the effect that equity wantonly disregards the provisions of the common and statute law. While presenting, therefore, to his view a collection of the most celebrated dogmas in which the judicial wisdom of past generations has sought to emphasize the distinctive characteristics of a peculiar jurisprudence, it has been thought

advisable briefly to estimate in a separate paragraph their relative weight and practical limitations. The student will observe that in the following analysis each maxim is referred to by the number assigned to it in the following list:—

The Maxims of Equity.

- (1.) Equity will not suffer wrong to go without remedy.
- (2.) Equity follows the law.
- (3.) When equities are equal, the first in time prevails.
- (4.) Where equities are equal, law prevails.
- (5.) He who seeks equity must do equity.
- (6.) He who comes to equity must come with clean hands.
- (7.) Delay defeats equities.
- (8.) Equality is equity.
- (9.) Equity regards the intent, not the form.
- (10.) Equity looks on that as done which ought to have been done.
- (11.) Equity imputes the intention to fulfil obligations.
- (12.) Equity acts *in personam*.

These maxims may be considered in relation to the division which has been adopted of the whole subject, that is to say, as indicating—

1. The principles, the theory, of equitable jurisprudence;
2. The peculiarities of equitable remedies and procedure.

The applica-
tion of
maxims illus-
trated.

1. Equity, as we have seen, administers justice from a higher point of view than law (distinctively so called) and declines to be fettered or misled by technicalities. Thus where a legal transaction which in form amounts to an absolute transfer of property, is in spirit and intention a mere pledge to secure a loan, equity will say so, and give effect to the intention (9), simply because a legal right is

here, from the higher point of view, a wrong, which equity cannot tolerate (1) (*d*).

Or again, if a bond made between two parties specifies a certain sum of money to be paid by either upon breach of the contract, a Court of equity, if satisfied that the sum named ought to be regarded as penal, that is, as a deterrent from the breach of the contract, rather than as a reasonable measure of the loss which such breach would entail, will (9) grant relief against the exaction of what is in truth a penalty, although in the bond it may have been described as liquidated damages (*e*). On a precisely converse principle, where there is evidence of an intention to do something, which has, however, not been legally done, equity (10) will ignore the latter fact, or, rather, will assume the contrary. Thus landed property which is by a testator's will directed to be sold, appears to the eyes of equity in the form of personalty, and is treated as such (*f*).

Of this kind of hypothetical jurisdiction we have other examples. A recognized procedure exists for the appointment of the official known as a trustee. But a Court of equity, on having its attention drawn to an individual, who, as having perhaps in a questionable manner become possessed in law of certain property, or as standing in a certain relation to other individuals, ought morally to incur the responsibilities of a trustee, will proceed at once to act on the supposition (10 and 11), and to compel him, in spite of his legally unimpeachable title, to perform the duties which he should have voluntarily undertaken (*g*).

Again, in the case of a person who is under an obligation to confer certain property on others—who has, for instance, covenanted to settle lands—and who has acquired but has not transferred property of the specified kind, equity will, by a pleasing fiction (11), regard the property as acquired with a view to the fulfilment of the obligation (*h*).

(*d*) See p. 237, Equity of Redemption.

(*e*) See p. 224, Relief against Penalties.

(*f*) See p. 450, Conversion.

(*g*) See p. 84, Constructive Trusts.

(*h*) See pp. 69 and 490, Resulting Trusts, Performance.

In all these cases it is idle to deny that the principles of equity conflict with and override the plain meaning of the law. But the reason is in each case apparent, and experience alone can guide the student in deciding what legal or quasi-legal wrongs can be redressed by a Court of equity. He must not infer that the two systems are eternally at variance (2). If equity, for instance, is said to delight in equality (8), equal distribution of property is also the aim of many of the provisions of law; *e. g.*, those which govern the distribution of the residuary personal estate of an intestate; and on the other hand, with the custom of primogeniture equity has never ventured to interfere. But there are cases where at law the survivor of several joint purchasers of certain property is held, on a somewhat arbitrary principle, entitled to the whole. Here equity, laying hold of the slightest evidence of a contrary intention, will say—No, let him be a trustee for the representatives of his co-purchasers, of their shares (*i*). Thus equity is said not to favour what is called the doctrine of joint-tenancy (*k*); but it can only interfere here, as elsewhere, upon special grounds (2).

Again, cases arise when apparently both parties can make out an adequate case for the interposition of equity; and since in such cases the interposition would often be nugatory, the conflicting equities are allowed to cancel out, and the operation of law is undisturbed (4) (*l*). It is on much the same principle that the assistance of a Court of equity is refused to a plaintiff whose own conduct *in the particular transaction* has not been equitable (6). If, for example, an infant by fraudulently concealing his age has induced his trustee to commit a breach of trust, the infant is clearly not the person to complain. If one party has been injured, the other has been deceived (*m*).

And not only must the plaintiff have abstained from

(*i*) See p. 81, Joint Purchasers.

2 My. & K. 195.

(*k*) Story's Eq. Jur. 1066.

(*m*) See p. 170, *Overton v. Ban-*
nister, 3 Ha. 503.

(*l*) See p. 129, *Thorncliffe v. Hunt*,
3 De G. & J. 563; *Sturge v. Starr*,

fraud or dishonesty, he must also be prepared to do what is equitable (5). Thus, when a husband finds it necessary to apply to a Court of equity in order to obtain possession of the equitable estate of his wife, he will only be aided upon the condition that he makes a fair settlement of the property upon his wife and children (n).

It has already been said, that when the conflicting interests of two or more parties are supported by equitable pleas of equal value, and (it may be added) when these are asserted with equal promptitude, equity, being unable to prefer one to the other, will leave law to take its course (4). But should this not be the case, then, *cæteris paribus*, i. e., there being no other distinction between the rival claimants for equity to lay hold of, the first in time will be favoured (3). And even where there are no rival "equities," the party who has, as it is called, "slept upon his rights," applies to the Court under great disadvantage (7); for from such indifference and delay an inference will naturally be drawn most damaging to the equitable case of the complainant. Particularly is this the case where the subject-matter in dispute is of a fluctuating value (o).

A general example of the conflict of equity with law on the above general principles, as exhibited in a branch of the jurisdiction now abolished, may be found in

THE EARL OF OXFORD'S CASE.

[1 Ch. Rep. 1; 2 W. & T. L. C. 590.]

Earl of Oxford's case.

In this case a bill was filed in equity in respect of a matter which had been already tried at law; and after the filing of the bill judgment was entered at law. The defendants demurred, relying mainly on the judgment as barring the relief in Chancery; but it was overruled by Lord Chancellor Ellesmere, who said that *there was no* Restraint of proceedings at law.

(n) See p. 384, Equity to a Settlement.

(o) See pp. 89, 90.

opposition to the judgment, nor would the truth or justice of the judgment be examined, but yet the chancellor might, where a judgment was obtained by oppression, wrong, or a hard conscience, restrain the person in whose favour it was issued from proceeding upon it.

We have here also an illustration of the sense in which equity is said to act more particularly upon the conscience of the individual, to deal with him as a reasoning moral agent, and not as a passive subject, whose position and whose rights are arbitrarily determined by categorical rules of law (12). And this aspect of the administration brings us naturally to the consideration of

2. The peculiarities of the procedure and remedies of equity.

Decrees of
equity *in per-*
sonam.

The decrees of a Court of equity are to be regarded, not so much as decisions affecting the property or rights in dispute, as in the light of directions or commands positive (*p*) or negative (*q*), addressed to the individual party or parties. It is seldom in the power of a Court literally to compel the performance by a recalcitrant party of a specified physical act. Its decrees are consequently said to be and in fact are only enforceable *by means of attachment and arrest*, the power of committal being often termed the keystone of equitable jurisdiction.

A leading authority upon this point is the case of

PENN v. LORD BALTIMORE.

[1 Ves. sen. 444 ; 2 W. & T. L. C. 939.]

The bill in this case sought specific performance of an agreement entered into between the plaintiffs and the defendant for settling the boundaries of land in America (then a British colony), by drawing lines in a particular manner specified.

Lord Hardwicke, after an elaborate judgment, decreed that the relief sought might be granted, on the ground that though the agreement could not be enforced *in rem*, the

p) See p. 637, Specific Performance. (*q*) See p. 688, Injunctions.

strict primary decree in that Court was *in personam*; and the defendant being in England it could be enforced by process of contempt *in personam*, and sequestration, which was the proper jurisdiction of the Court. But the Court refused to decree quiet enjoyment of the lands, application for that purpose being proper only to Courts having jurisdiction over the land itself.

The great number of cases in which the principle here explained and established has been applied show that it is immaterial in such cases where the land or property concerned is situated, whether in England, or the colonies, or some foreign country. The only essential requirement is that the party to whom the decree will be addressed should be within the jurisdiction, and so subject to the process of the Court.

On the other hand, it must be remembered that though the power of the Court is not restrained by the absence in the *lex situs* of such an equity as is sought, the jurisdiction cannot be exercised where it is absolutely excluded thereby. The limits of the principle. “If the *lex situs* excludes such equity, then the right to “hold the land free from it becomes one of the incidents “of property” (r). Nor will the Court entertain an action where the *title* to foreign land is in dispute, and a decision would involve adjudication on points of foreign law (s). Moreover, when the land in question is out of the jurisdiction no decree will be pronounced which purports *directly* to affect them. Thus, a partition of land in Ireland will not be decreed in England, simply because no power could be given to commissioners to go there and take the steps necessary for carrying out the decree (t). This, however, is totally distinct from such a case as *Penn v. Lord Baltimore*, in which the decree (although its ultimate practical effect would no doubt be the settlement of boundaries out of the jurisdiction) dealt expressly with

(r) *Westlake's Private Inter.* 743.
Law, 64, 65.

(t) *Carteret v. Pettus*, 2 Ch. Ca.
(s) *Graham v. Massey*, 23 Ch. D. 214; 2 Swanst. 323, n.

the agreement of the parties, and was directed immediately *in personam*.

Contents of
Part I.

For our present purpose we think this analysis of the maxims affords a sufficient illustration of the substantive and administrative distinctions between equity and law to enable the student to appreciate the classification of those matters especially allocated to Courts of equity by the Judicature Acts, as above mentioned. It directs us to the following subjects as falling under the first division of our work ; that is to say, as falling within the jurisdiction of equity *chiefly* on the ground of its distinctive substantive principles.

1. Trusts.
2. Frauds.
3. Equitable relief against the consequences of Accident and Mistake.
4. Relief against Penalties and Forfeitures.
5. Mortgages and Liens.
6. Suretyship.
7. Modifications of the Law as regards Married Women's Property.
8. The Guardianship of Infants.
9. The peculiar doctrines of Election, Conversion, Satisfaction, and Performance.

CHAPTER I.

TRUSTS.

SECTION I.—GENERAL VIEW.

- I. *Historical Outline.*
- II. *What may be the Subject of a Trust.*
- III. *Who may be a Trustee.*
- IV. *Who may be a Cestui que Trust.*
Charities.
- V. *Classification of Trusts.*

I. *Historical Outline.*

1. Students of Roman law are familiar with the device which was resorted to in the later days of the Republic for enabling testators to dispose of their property in favour of persons who were unable to take it directly by way of inheritance or legacy. Where the civil law threw any impediment in the way of such a disposition as was desired, the practice arose of bequeathing the property to someone who could legally take it, in reliance on, or trusting to, his good faith, to carry out the donor's intention with respect to it. Such gifts were known as *fidei-commissa*. At first, the only security for their proper execution was the honour of the person so entrusted; but in the reign of Augustus, though no legal action could be brought for their enforcement, jurisdiction was conferred upon a special prætor to take cognisance thereof, and to carry them into execution. From that time the operation of *fidei-commissa* revolutionised the testamentary law

Fidei-commissa
in Roman
law.

of the State, and prepared the way for its later development in directions little thought of at the time of their introduction.

Common law
restrictions on
the alienation
of land.

2. The history of English law presents to us a very similar chapter. The common law imposed many restrictions upon the conveyance and devising of landed property, which the possessors thereof continually exercised their ingenuity to escape. Absolute ownership in land the law has never recognised. Whoever was in immediate enjoyment of it could claim only an interest of greater or less extent and duration, subject to the rights of a superior lord, or at any rate of the Crown, as chief and paramount lord of all the soil of the country. It is plain that in many circumstances the power of free disposal of these interests might greatly interfere with such rights, especially with the ultimate right of receiving back the land itself. Particularly was this the case where land was transferred or assigned to a corporate body, such as an ecclesiastical order, or a bishopric, which subsisted perpetually, so that such land could never again revert as vacant or undisposed of to the superior lord. Accordingly, by the Statutes of Mortmain, lands were prohibited from being given for religious purposes.

Mortmain.

Introduction
and nature of
uses,

3. It was with a view to elude such restrictions that trusts, or as they were anciently called, uses, were introduced in England. The device was that the transferor, while retaining the legal estate, or conveying it as the law allowed, should declare the use of the estate to some third person, affixing on the conscience of the legal owner the duty of carrying into effect such declared intention. By this means it was sought to transfer the beneficial interest in a manner which the law would not sanction, or to persons or corporations whom the law would have forbidden to receive it.

at first
dependent on
good faith.

4. As in the case of the *fidei-commissa* of Roman law, these uses or trusts were originally dependent for their execution entirely upon the good faith or honour of the

legal owner or trustee. But in the reign of Richard II., John Waltham, Bishop of Salisbury, who was then Lord Keeper, devised the writ of *subpœna*, by which a refractory trustee might be summoned before the Court of Chancery, there to answer on oath the charges of the beneficiary or *cestui que use*. This Court, claiming a special jurisdiction in matters of conscience, enforced the execution of the use or trust, though without affecting to interfere with the ownership at common law. Writ of *subpœna*.

The addition of this security for the enforcement of uses soon led to their extensive employment. Though arising from the restrictions on the assignment of freehold land, their principle was evidently applicable to other kinds of property, and trusts of real and personal chattels came into common use. Trusts came also to be employed for other purposes than the beneficial transfer of property. It was often convenient to give an interest to a trustee for the performance of some specific duty, such as to convey in a given manner, or to sell for payment of debts, &c. More important still was the application of the doctrine by which landowners obtained the power of devising their estates by will. Extension of uses and trusts.

5. So extensive were the inroads thus made on the policy of the law, especially as to the legal incidents of tenure and the rights of creditors and purchasers, that uses and trusts soon became the subjects of statutory interference (*a*). It is not, however, now necessary to do more than refer to matters so completely obsolete. Statutory interferences therewith.

At length it was determined to abolish the application of uses to freehold land entirely, and with that intent the Statute of Uses (*b*) enacted that where any person stood *seised of any hereditaments* to the use, confidence, or trust of any other person, or of any body politic, such person or body politic as had any such use, confidence, or trust, should Statute of Uses, 27 Hen. VIII. c. 10.

(*a*) 1 Rich. III. c. 1; 19 Hen. VII. c. 15; 26 Hen. VIII. c. 13.

(*b*) 27 Hen. VIII. c. 10.

be deemed in lawful *seisin* of the hereditaments in such like estates as they had in use, trust, or confidence. The effect of this was at once to convert all uses, whether expressed in words or merely implied in equity, into legal estates, and thus to bring them within the rules of law.

To what uses
it referred.

Not to per-
sonalty, copy-
holds,

or special
uses.

The technical meaning of the words employed, however, prevented the statute from entirely subverting the doctrine of trusts. The words "*seised*," "*seisin*," and "hereditaments" being only applicable to freehold estates, the statute was adjudged not to affect any trusts of personal property or chattels, or even leasehold interests in land, or copyholds. Seeing also that the statute referred only to cases in which one person was "*seised, &c., to the use of any other person*," it obviously could not affect special uses, *i.e.*, uses in which the conveyance was to the trustee for some limited or specific purposes, such as have been mentioned. All trusts, therefore, in property other than freehold, and all trusts in which the trustee was not a mere passive owner of a legal estate the benefit of which was secured to someone else, but had active duties to perform, remained as valid as before the statute.

Effect of the
statute
destroyed,

6. This sweeping Act was, however, no sooner passed than its effect was destroyed by the construction put upon it by the judges of common law; and the old uses in real property at once reappeared under the modern name of trusts. This came about as follows. If there was a feoffment to A. and his heirs to the use of B. and his heirs, then before the statute A. took a legal fee simple, and B. was a *cestui que use*, who could only seek his remedies in Chancery. After the statute the same limitation would secure not only the use but also the legal estate to B. The use would, in short, at once draw to itself the legal estate. But the judges held that where there was a limitation to A. and his heirs to the use of B. and his heirs to the use of (or in trust for) C. and his heirs, then the statute had no effect beyond the use limited to B. It converted the use first declared into a legal estate, but in

so doing its power was exhausted, and a second use or trust, declared upon or after the first, remained unaffected thereby (c). Such being the decision of the judges, the Court of Chancery asserted the same authority over the first *cestui que use* as it had previously exerted over the primary assignee, and enforced upon him the execution of the second use or trust. Thus it has been said that the whole effect of the Statute of Uses was to add four words, "to the use of," to every conveyance of lands.

and consequent re-appearance of trusts.

Trusts having been thus curiously revived, have continued down to the present day; and under the development of the doctrines respecting them which took place under the later chancellors, especially Lord Nottingham, now constitute one of the most advantageous branches of equitable jurisdiction.

7. It is not necessary to add to this brief sketch a history of the various steps by which trusts have attained their present position in our jurisprudence. Sufficient has been said to indicate the nature of a trust, and to render a more formal definition intelligible. A trust has been defined as a beneficial interest in, or ownership of, real or personal property, unattended with the possessory or legal ownership thereof (d). But this is rather a definition of an equitable estate than of a trust, and it omits to take account of special trusts, such as have been already referred to, in which the object of the trust is the performance of some particular duty rather than the vesting of the beneficial ownership in some person other than the legal owner. *A trust is rather a duty deemed in equity to rest on the conscience of a legal owner. This duty may be either passive, such as to allow the beneficial ownership to be enjoyed by some other person, named the cestui que trust, in which case the legal owner is styled a bare trustee; or it may be some active duty, such as to sell, or to administer for the benefit of some other person or persons; such as the duties of a trustee in bankruptcy.*

Definition of a trust.

(c) *Tyrell's case*, Tudor's L. C. 335. (d) 2 Spence, 875.

II. *What Property may be the Subject of a Trust.*

Generally any property may be subject of a trust.

Land of any tenure.

Colonial and foreign land only *sub modo*.

Personal property.

As a general rule property of any kind, legal or personal, may be made the subject of a trust.

We have seen that trusts arose chiefly in connexion with freehold estates. They are equally applicable to copyholds, or to lands subject to any special customs, such as gavelkind or borough-English. In such cases equity as usual follows the law in its treatment thereof: thus equitable estates will be guided by the same rules, as to descent for instance, as legal estates in the same land.

Courts of equity will also, as seen in *Penn v. Lord Baltimore* (*sup.* p. 16), enforce natural equities in and contracts respecting colonial or foreign land, provided the parties be within the jurisdiction and the case admits of a remedy by action *in personam* (*e*). But trusts, strictly so called—that is, trusts of the nature of the ancient uses—cannot, it would seem, be engrafted upon foreign real estate, the tenure of which may have no harmony with the principles of English law (*f*).

Trusts are applicable to leaseholds, personal chattels, choses in action, and every description of personal property; and on the principle that *mobilia sequuntur personam*, as long as the party is domiciled within the jurisdiction of the Court, it matters not where the property in question is situate. The only limit is that in the case of property lying beyond the reach of the Court the practical obstructions in the way of executing the trust may be sometimes a bar to relief.

(*e*) *Norris v. Chambres*, 3 De G. F. & J. 584.

(*f*) *Lewin*, 8th ed., p. 49.

III. *Who may be a Trustee.*

Any person capable of taking and holding the property of which the trust is declared, and competent to deal therewith, may be a trustee. He should also be within the reach of the arm of the Court, or, in other words, domiciled within its jurisdiction.

Proper qualifications of trustee.

(1.) The sovereign may sustain the character of a trustee, so far as regards the capacity to take the estate and to execute the trust. It is not clear, however, by what machinery a trust so vested could be enforced. Probably the only resource for such a purpose would be a petition of right (*g*).

Sovereign.

(2.) A corporation may now be a trustee, since the ancient doctrine that trusts rested on the foundation of personal confidence has evaporated. There is ample jurisdiction in the Courts to enforce the performance of its duty by such a trustee (*h*). The only restriction is that the license of the Crown is necessary for the conveyance of real estate to a corporate body; and this restriction is as applicable to a bare legal estate as to a beneficial interest. By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), it is expressly provided that bodies corporate of boroughs may, in certain cases, be treated for all intents and purposes as trustees.

Corporation.

(3.) A married woman is legally capable of being a trustee; but notwithstanding that by the Married Women's Property Act of 1882, ss. 18, 24, a husband is no longer liable, in cases falling within the Act, for a breach of trust committed by his wife, and that the impediments in the way of her execution of legal assurances have been to a great extent removed, nevertheless, considering the general amenability of a married woman to

A married woman.

(*g*) Lewin, 8th ed., p. 30.

(*h*) *Att.-Gen. v. St. John's Hosp.*,
2 De G. J. & S. 621.

the influence of her husband, there remains sufficient ground for considering such an appointment undesirable, except for special reasons (*i*). And this being so, it is not generally advisable to make an unmarried woman a trustee, since, if she should marry, the above disadvantages would at once arise (*k*).

An infant. (4.) An infant is under still greater disabilities, having no legal capacity or discretion. Any of his acts, beyond such as were merely ministerial, would be void. He could not be held guilty of a breach of trust. A case, therefore, is scarcely conceivable in which circumstances could warrant such an appointment.

An alien. (5.) Formerly an alien, being disabled from holding English freeholds or chattels real, could not be a trustee of such. There was never, however, any legal objection to his appointment as trustee of chattels personal; and since the Naturalization Act, 1870 (*l*), an alien may hold property of any description, and may accordingly be trustee thereof.

Bankrupts. (6.) Bankrupts are not absolutely disqualified from being trustees, and a person's bankruptcy has no operation upon the trust estate vested in him; but by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52, s. 85), when a receiving order in bankruptcy is made against a trustee, he thereby vacates his office; and bankruptcy is a good ground for the removal of a trustee (*m*).

Equity never wants a trustee. (7.) Lastly, it is a maxim that *equity never wants a trustee*; and wherever by the declaration of a party or by operation of law a trust exists, equity will follow the legal estate, in whatever hands it may be (except those of a purchaser for value without notice), and enforce the execution of the trust. The lapse of the legal estate has no influence upon the trusts to which it is subject. If the

(*i*) *Drummond v. Tracy*, Johns. 608, 611; *Re Berkley*, 9 Ch. 720; and see *Dowra v. Faith*, 29 Ch. D. 693.

(*k*) See *Re Campbell's Trusts*, 31

Beav. 176.

(*l*) 33 Vict. c. 14.

(*m*) *Re Barker's Trust*, 1 Ch. D. 43; *Re Adam's Trust*, 12 *ib.* 634; B. A. 1883, s. 147.

persons named as trustees fail, either by death, or refusal to act, or otherwise, the Court will provide a trustee; and if no trustees are appointed at all, the Court itself assumes the office, and will execute the trust.

IV. *Who may be a Cestui que Trust.*

As a general rule anyone who is capable of taking a legal interest in property may, through the medium of a trust, enjoy an equitable interest therein. But this is not all; for in certain cases persons may take an equitable interest to whom a legal estate could not be similarly limited. Generally any one who can hold legally.

1. Thus an equitable interest could always have been conferred upon a married woman to her separate use, free from the control or participation of her husband; while until recently no property could be so limited at law as to exclude the rights of her husband during the coverture. Married women's separate estate.

2. A trust may be declared in favour of the sovereign, without the restriction which formerly existed, that the title of the property so limited should be matter of record. The sovereign.

3. An alien might always have been a *cestui que trust* of personalty, and therefore, as it was held, of the proceeds of land directed to be sold, which was in equity considered as if it already were in the form of money. Before the Naturalization Act, 1870 (*n*), a trust of realty might have been declared in favour of an alien, and might have been enforced by him against all save the Crown. The Crown, however, might have secured the beneficial interest by suit against the trustee. By that Act real property was, as we have seen, placed in this respect on the same footing as personalty. Alien.

4. A trust of lands cannot be limited to a corporation Corporation.

(*n*) 33 Vict. c. 14.

save by license from the Crown. There is no such restriction on the enjoyment by a corporation of an equitable interest in personalty.

Charities. 5. A legal estate cannot be limited to the objects of a charity, as to the poor of a parish in perpetual succession ; but in a Court of equity, where feudal rules do not apply, the intention of the donor will be carried into effect, unless within the prohibitions of the Mortmain Act (*o*) as to alienations of land.

Charities.

Charitable
Trusts.

Trusts in favour of Charities, called by some Express Public Trusts, being in some respects peculiar, require a separate consideration, for which this is a convenient place.

43 Eliz. c. 4.

(1.) Whatever may have been the origin of the equitable jurisdiction as to charities, it was by the Statute 43 Eliz. c. 4, that its limits and *modus operandi* were first clearly established ; and it is to that statute that we must look for a definition of what objects are included under the term “charity” (*p*). In the preamble thereof the following objects are mentioned : “The relief of aged, impotent, and “poor people; the maintenance of sick and maimed soldiers “and mariners; schools of learning, and scholars in uni- “versities; the repair of bridges, ports, havens, causeways, “churches, sea banks, and highways; the education and “preferment of orphans; the relief, stock, or maintenance “of houses of correction; the marriages of poor maids; the “supportation, aid, and help of young tradesmen, handi- “craftsmen, and persons decayed; the relief or redemption “of prisoners or captives; the aid or ease of any poor in- “habitants concerning payments of fifteens, setting out of “soldiers, or other taxes.” The term charity in the sense in which it is used in Courts of equity includes only such bequests as are within the letter and spirit of this enumeration (*q*). The tendency has been to give to these words

What are
charitable
objects.

(*o*) 9 Geo. II. c. 36.

(*p*) Story, 1145, 1155.

(*q*) *Morice v. Bp. of Durham*, 9

Ves. 399, 405; 10 *ib.* 522, 541;

Kendall v. Granger, 5 Beav. 300,

302; Story, 1155, 1158.

a liberal interpretation, and that being so, they will be seen to cover a very wide range of objects. Thus, not only gifts in aid of poverty, education and religion, but provisions for public beneficial works, such as the improvement of towns, paying off the national debt, the Royal Humane Society, &c., have been deemed within the equity of the statute (*r*). There are, however, many cases in which relief has been refused on the ground that the objects were not such as could be brought under any of the terms employed. Thus no superstitious uses, such as to pay for prayers for the dead (*s*), or the maintenance of a lamp in a church or chapel (*t*), are within its purview, notwithstanding 23 & 24 Vict. c. 134; nor will general expressions of intended benevolence be carried into execution (*u*); nor gifts restricted to the benefit of individuals (*x*). What not so.

(2.) But wherever a valid charitable trust appears, a Court of equity is always disposed to treat it with favour, and in many circumstances it applies to such trusts a more liberal construction than it would in the case of a gift to an individual. The following cases afford illustrations of this:— Charitable trusts re-
garded with
favour.

(i.) If a testator gives his property to such person as he shall hereafter name to be his executor, and afterwards appoints no executor, or having appointed an executor, the latter dies in the testator's lifetime, such bequests will fail, and the next of kin will take the estate, as in a case of intestacy. But if a like bequest be given to an executor in favour of a charity, the Court itself will supply the place of an executor and carry it into effect (*y*). Thus Court
will prevent a
lapse,

(*r*) See *Yates v. University College*, 8 Ch. 454; 7 L. R. H. L. 438; *Jones v. Williams*, Amb. 651; *London University v. Yarrow*, 23 Beav. 159; *Obert v. Barrow*, 35 Ch. D. 472.

(*s*) *West v. Shuttleworth*, 2 My. & K. 684.

(*t*) *Story*, 1164.

(*u*) *Ellis v. Selby*, 7 Sim. 352; 1 My. & Cr. 286; *Leavers v. Clayton*, 8 Ch. D. 584.

(*x*) *Thomas v. Howell*, 18 Eq. 198; *Att.-Gen. v. Hughes*, 2 Vern. 105.

(*y*) *Story*, 1165; *Mills v. Farmer*, 1 Mer. 55, 96; *Pocock v. Att.-Gen.*, 3 Ch. D. 342.

(ii.) If an estate is devised to such an individual as the executor shall name, and no executor is appointed, or one being appointed dies in the testator's lifetime, the disposition fails. But such a gift in favour of a charity would be executed (z).

and supply
defective di-
rections.

(iii.) If a testator has expressed an absolute intention to give a legacy to charitable purposes, but has left uncertain, or to some future act, the mode by which it is to be carried into effect, then a Court of equity will of itself supply the defect and enforce the charity. For instance, if a man bequeaths a sum of money to such charitable uses as he shall direct by a codicil annexed to his will, and dies without making such codicil, the Court will devote the gift to such charitable purposes as it thinks fit (a). But such assistance will only be given where the charitable intention is definite and general (b).

Doctrine of
cy-pres.

(iv.) Where the literal execution of the trusts of a charitable gift becomes inexpedient or impracticable, the Court will execute them *cy-pres*, i.e., following as nearly as it can the original purpose. This important principle of *cy-pres* is thus expressed by Lord Eldon : " If a testator has manifested a general intention to give to a charity, the failure of the particular mode in which the charity is to be executed shall not destroy the charity ; but if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished " (c).

Moggridge v.
Thackwell.

Thus where a charitable bequest is so given that there can be no objects, the Court will order a new scheme to execute it ; or when the specified objects cease to exist, the Court will new model the charity. A commonly

(z) Story, 1166 ; *Moggridge v. Thackwell*, 7 Ves. 36.

(a) *Att.-Gen. v. Syderfin*, 1 Vern. 224 ; 2 Freem. 261.

(b) *Leavers v. Clayton*, 8 Ch. D. 584 ; *Aston v. Wood*, 6 Eq. 419.

(c) *Moggridge v. Thackwell*, 7 Ves. 36, 69.

quoted and striking illustration of this is seen in the case of

ATT.-GEN. v. THE IRONMONGERS' CO.

[2 Beav. 313],

where there was a bequest of the residue of a testator's estate to a company to apply the interest of a moiety "unto the redemption of British slaves in Turkey or Barbary," one-fourth to charity schools in London and its suburbs, and one-fourth towards necessitated freemen of the company. There being no British slaves in Turkey or Barbary to redeem, the Court directed a master to approve of a new scheme *ex-parte*, and sanctioned a scheme which gave the moiety thus undisposed of to the donees of the other fourth parts (*d*). Similarly, where the original scheme has become practically unfeasible owing to a large increase of the fund (*e*), or from the fact that the object originally intended has been fully satisfied without exhausting the fund (*f*), the Court will sanction a new scheme for the disposal of the gift.

All these doctrines proceed upon the same ground; namely, that it is the duty of the Court to effectuate the general intention of the testator; and accordingly the application of them ceases whenever such general intention is not found. If, therefore, it is clearly seen that the testator had one particular object in his mind, as, for example, to build a church at W., and that purpose cannot be answered, the next of kin will take, there being no general charitable intention (*g*). Also, if the charity be of a general, indefinite, or merely private nature, the disposition will be treated as utterly void. In such a case, as the trust is not ascertained, the fund must go either as an absolute gift to the individual selected to distribute it, or

Particular charitable design distinguished from general.

(*d*) Story, 1170 a.

(*e*) *Re Campden Charities*, 18 Ch. D. 310.

(*f*) *Pease v. Pattinson*, 32 Ch. D.

154.

(*g*) Story, 1182; *Clark v. Taylor*, 1 Drew. 642; *Fisk v. Att.-Gen.*, 4 Eq. 521.

to the next of kin : now it being a general principle that if a testator means to create a trust, and does not effectually do so, the trustee may not benefit thereby, the next of kin will in such cases be entitled (*h*).

Defective conveyances remedied.

(v.) In further aid of charities, the Court will supply all defects of conveyances where the donor has a capacity and a disposable estate, and his mode of donation does not contravene the provisions of any statute. Thus it used formerly to supply the want of a surrender of copyholds, and it has dispensed with a strict compliance with the terms of a power, in neither of which cases would it interfere on behalf of a private object of a voluntary gift. But it would not carry into execution a will not made with the formalities required by the Wills Act (*i*).

(vi.) Charities are not deemed to be within the rule against perpetuities. Thus, a bequest by a testator "for the use and benefit of the poorest of his kindred," was sustained as being a good charity (*k*).

As to the treatment by equity of resulting trusts in charitable gifts, see *infra*, p. 71.

Assets not marshalled in favour of charities.

The general favour shown by equity for charities does not, however, go so far as to permit of the marshalling of assets in their favour, since to do so would be to infringe the Mortmain Acts. Thus if a testator give his real and personal estate to trustees upon trust to sell and pay his debts and legacies and apply the residue to a charity, equity will not marshal the assets by throwing the debts and legacies upon the proceeds of the real estate and chattels real in order to leave the pure personalty for the charity. The fund will be appropriated as if no legal objection existed as to applying any portion of it to the charity ; and such proportion of the charity legacies will

(*h*) Story, 1183; *Stubbs v. Sargon*, 2 Keen, 255.

(*i*) 1 Vict. c. 26; Story, 1171; *Tuffnell v. Page*, 2 Atk. 37; *Sayer v. S.*, 7 Ha. 377; *Innes v. Sayer*, 3

Mac. & G. 606.

(*k*) *Att.-Gen. v. D. of Northumberland*, 7 Ch. D. 745; *Gillam v. Taylor*, 16 Eq. 581; *Isaac v. Defriez*, Amb. 595.

be held to fail as would in that way fall to be paid out of the prohibited fund (*l*).

A testator may, however, of course, himself direct his charitable gifts to be paid out of his pure personalty, and the Court will give full effect to such direction (*m*).

V. *Classification of Trusts.*

The leading division of trusts adopted by Mr. Lewin (*n*) Lewin's classification. distinguishes between those trusts which are created by the act of a party, and those which arise from the operation of law. This classification recommends itself in that it not only calls attention to the very prominent distinction between the different kinds of trusts as regards their creation, but also in that it coincides with an equally prominent distinction in the nature of the trusts themselves. It therefore has all the merit that can be looked for in a classification.

Trusts which are created by the act of a party are Express trusts. denominated express trusts. Trusts which arise from the operation of law are of two kinds, Resulting Trusts and Constructive Trusts. In certain cases, from the manner of a party's dealing with his property, equity *presumes an intention* on his part to sever the legal and equitable interests by creating a trust. Such trusts are Resulting Resulting Trusts. Trusts. In other cases, without any reference to the expressed or presumed intention of the parties, equity will, *in order to satisfy the demands of justice and good conscience*, assume the severance of the legal and equitable interests, and create a trust. Such trusts are Constructive Constructive Trusts. Trusts.

(*l*) *Hobson v. Blackburn*, 1 Keen, 273; *Robinson v. Gov. of London Hosp.*, 10 Ha. 19. See *Cornford v. Elliott*, 29 Ch. D. 947; 27 *ib.* 318.

(*m*) *Miles v. Harrison*, 9 Ch. 316; *Ravenscroft v. Workman*, 37 Ch. D. 637.

(*n*) 8th ed., p. 18.

These three several species of trusts will naturally yield to further analysis as they are separately considered.

Ambiguity of
"implied
trusts."

It may be well here to state that the trusts above described as Resulting Trusts are by some writers designated Implied Trusts (o). The nomenclature here employed is that of Mr. Lewin, by whom the term "implied trusts" is used to describe a sub-division of express trusts, namely those trusts which are created by the use of informal precatory expressions.

(o) Snell's Principles of Equity.

SECTION II.—EXPRESS TRUSTS.

- I. *The Creation of the Trust.*
- II. *Distinction between Executed and Executory Trusts.*
Glenorchy v. Bosville.
- III. *Voluntary Conveyances and Trusts.*
 1. *Gifts.*
 2. *Unexecuted intentions to give.*
 3. *Voluntary Trusts.*
Ellison v. Ellison.
 4. *Statutory Modifications.*
 5. *Trusts for Payment of Debts.*

I. *The Creation of the Trust.*

As a general rule, any person who is competent to deal with the legal estate may vest it in a trustee to be held by him subject to the directions of the settlor.

1. Before the Statute of Frauds, trusts of every species of property might have been created or transferred by parol; but by that statute (*p*) it was enacted,

Statute of
Frauds.
29 Car. II.
c. 3.

“That all *declarations or creations* of trusts or confidences of any lands, tenements or hereditaments, shall be manifested, or proved by some writing signed by the party who is by law enabled to declare such trusts, or by his last will in writing” (*q*).

s. 7.

“That all *grants and assignments of any trust or confidence* shall likewise be in writing, signed by the party granting or assigning the same, or by his last will” (*r*).

s. 9.

(*p*) 29 Car. II. c. 3.

(*r*) s. 9.

(*q*) s. 7.

s. 8.

“ Provided always, that where any conveyance shall be
 “ made of any lands or tenements by which a trust or
 “ confidence shall or may arise or result by the implication
 “ or construction of law, or be transferred or extinguished
 “ by an act or operation of law such trust or con-
 “ fidence shall have the like force and effect as if
 “ this statute had not been made ” (s).

Scope of the statute.

Thus a trust of freeholds, or of copyholds or of leaseholds, can no longer be created or transferred without a written instrument. A trust of personal chattels may still be generally created by parol, but cannot be assigned save by a written instrument; and resulting and constructive trusts are unaffected by the Act.

These rules are applicable whatever be the object of the trust, whether it be of a private or public or charitable nature (t).

Requires only evidence in writing.

It is to be observed that the statute does not require more than that the trusts within its purview shall be manifested and proved by writing. It is satisfied by *written evidence* of a trust which may not necessarily have been originally declared in writing (u). It is necessary, however, that in such cases the evidence should clearly be shown to relate to the subject of the alleged trust (x); and not only the fact of the trust, but also the terms of it, must be supported by evidence under signature (y).

Formal expressions not required.

2. No particular form of expression is necessary to the creation of a trust, if, on the whole, it can be gathered that a trust was intended. “ As a general rule, when property
 “ is given absolutely to any person, and the same person is
 “ by the giver, who has power to command, recommended
 “ or entreated, or wished to dispose of that property in
 “ favour of another, the recommendation, entreaty, or wish
 “ shall be held to create a trust, *first*, if the words are so

The three certainties.

(s) s. 8.
 (t) *Loyd v. Spillet*, 3 P. Wms. 344; 2 Atk. 148.
 (u) *Forster v. Hale*, 3 Ves. 696; *Moorecroft v. Dowding*, 2 P. Wms.

314.
 (x) *Forster v. Hale*, *sup.*
 (y) *Ibid.*; *Smith v. Matthews*, 3 De G. F. & J. 139; *Kronheim v. Johnson*, 7 Ch. D. 60.

“used that on the whole they ought to be construed as
 “imperative; *secondly*, if the subject of the recommenda-
 “tion or wish be certain; *thirdly*, if the objects or persons
 “intended to have the benefit of the recommendation or
 “wish be also certain” (z).

(1.) *The words must be imperative.*

Words must
 be imperative.
 Illustrations.

As illustrating what expressions are deemed to be sufficiently imperative, we find that the words “wish and request” (a), “have fullest confidence” (b), “heartily beseech” (c), “well know” (d), “of course he will give” (e), have been so considered. But the leaning of the Court is against construing merely precatory or recommendatory words as creating trusts. Thus, if such expressions as the above are accompanied by other words which indicate an intention that the first taker should have a discretionary power over the subject, or that the donor did not intend the wish to be imperative, no trust will be created (f). The tendency of modern decisions is still more pronounced in this direction, and such cases as *Bardswell v. B.* and *Robinson v. Smith* would very probably not now be followed (g). Thus, in *Re Adams and the Kensington Vestry* (h), a gift of real estate “to the absolute use of” the testator’s wife, “in full confidence that she would do “what was right as to the disposal thereof between his “children, either in her lifetime, or by will after her “decease,” was held not to create a trust. The same was held by the House of Lords in a similar case, where the expression used was “feeling confident that she will act “justly to our children in dividing the same when no “longer required by her” (i).

Tendency of
 the Court.

(z) *Per* Lord Langdale, *Knight v. K.*, 3 Beav. 148, 172; 11 Cl. & F. 513.

(a) *Godfrey v. G.*, 11 W. R. 554.

(b) *Shovelton v. S.*, 32 Beav. 143.

(c) *Meredith v. Heneage*, 1 Sim. 542, 553.

(d) *Bardswell v. B.*, 9 Sim. 319.

(e) *Robinson v. Smith*, 6 Mad. 194.

(f) *Howorth v. Dewell*, 29 Beav. 18; *Benson v. Whittam*, 5 Sim. 22.

(g) *Lambe v. Eames*, 10 Eq. 267; 6 Ch. 597; *Hutchinson v. Tenant*, 8 Ch. D. 540; *Parnall v. P.*, 9 Ch. D. 96.

(h) 24 Ch. D. 199; 27 *ibid.* 394.

(i) *Mussoorie Bank v. Raynor*, 7 App. C. 321.

Moreover, clear words of gift to a devisee for his own benefit, free from control, will not be cut down by subsequent words which amount to an expression of desire (*k*).

Secret trust enforced on ground of fraud.

A person apparently taking property by devise or bequest from a testator, with the knowledge of the existence of another instrument, which he actually or impliedly undertakes to carry into effect, will be fixed as a trustee with the performance of the directions given in such instrument, when the Court is satisfied that he has fraudulently induced the testator to confide to him the duty which he undertook to perform (*l*). In such cases the existence of fraud induces a departure from the usual rule against allowing any force to a document of a testamentary nature not properly executed. In other words, fraud creates a right to the discovery of secret trusts, notwithstanding the Wills Act (*m*), and such trusts may be proved by parol evidence, notwithstanding the Statute of Frauds (*n*).

Illegal secret trust.

If, however, a secret trust of such a nature arises from a bargain which designs to contravene the policy of the law, for instance, in attempted circumvention of the Mortmain Acts, the trust will be set aside in favour of the heir (*o*), or, in the case of personalty, the next of kin, or residuary legatee (*p*).

(2.) *The subject-matter must be certain.*

Subject must be certain.

Thus where a testator devised real property to his wife to be sold for the payment of his debts and legacies in aid of his personal estate, and added that he "did not doubt but his wife would be kind to his children," no trust was created, because no right to any particular part of the estate was conferred (*q*). So in a similar case where the words used were "not doubting, as she has no relations of

Illustrations.

(*k*) *Meredith v. Heneage*, 1 Sim. 542; *White v. Briggs*, 15 Sim. 33.

(*l*) *Godefroi on Trusts*, p. 79; *McCormick v. Grogan*, 4 L. R. H. L. 82; *O'Brien v. Tyssen*, 28 Ch. D. 372.

(*m*) *Thynn v. T.*, 1 Vern. 295;

Norris v. Frazer, 15 Eq. 318, 330.

(*n*) *Edwards v. Pike*, 1 Ed. 267.

(*o*) *Muckleston v. Brown*, 6 Ves. 69.

(*p*) *Stickland v. Aldridge*, 9 Ves. 519.

(*q*) *Buggins v. Yates*, 9 Mod. 122.

her own, but that she will consider my near relations should she survive me, as I should consider them myself should I survive her," the result was the same (*v*). Similarly the expressions "well knowing he will remember" certain objects (*s*), "do justice to," or "deal justly and properly with" (*t*), or a recommendation to give "what shall be left at his death" (*u*), or "what he may have saved" (*x*), are considered too indefinite to create a trust (*y*). But such cases must be distinguished from those in which there is a gift over of a legacy, or so much thereof as *shall not have been paid to or received by the legatee*. Such a gift is not void for uncertainty (*z*).

(3.) *The objects or cestuis que trust must be certain.*

Objects must be certain.

In *Harland v. Trigg* (*a*), where a testator gave leaseholds to his "brother for ever, hoping he will continue them in the family," Lord Thurlow held that no trust was created, and said: "I take the rule of law to be this, "that two things must concur to constitute these devises, "—the terms and the object. *Hoping* is in contradistinction to a direct devise; but whenever there are annexed "to such words precise and direct objects the law has con-nected the whole together, and held the words sufficient "to raise a trust;—but then the objects must be distinct." Similarly the expression "near relations" (*b*) has been considered too indefinite to create a trust.

The distinction must, however, be carefully observed between those cases in which, as above, it was held that no trust was created, and therefore the legatee might hold the estate or bequest beneficially, and other cases in which, though the terms are not sufficiently certain and definite

Distinction where trust is manifestly intended.

(*v*) *Sale v. Moore*, 1 Sim. 534; and see *Curtis v. Rippon*, 5 Mad. 534.

(*s*) *Bardswell v. B.*, 9 Sim. 319.

(*t*) *Pope v. P.*, 10 Sim. 1.

(*u*) *Wynne v. Hawkins*, 1 Bro. C. C. 179.

(*x*) *Cowman v. Harrison*, 10 Ha. 234.

(*y*) See also *Eade v. E.*, 5 Madd. 118; *Finden v. Stephens*, 2 Ph. 142; *Horwood v. West*, 1 S. & S. 387; *Shaw v. Lawless*, 5 Cl. & F. 129.

(*z*) *Chaston v. Seago*, 18 Ch. D. 218; *Johnson v. Crook*, 12 *ibid.* 639.

(*a*) 1 Bro. C. C. 141.

(*b*) *Sale v. Moore*, 1 Sim. 534.

Then trustee
cannot take
beneficially.

to create an effectual trust, it is, nevertheless, *the manifest intention of the testator that there shall be a trust of some kind*, and that the donee shall not take beneficially. It is an unfailing principle that *if a trust is clearly intended, the intended trustee cannot take beneficially*. In *Briggs v. Penny* (c), Lord Truro said: "If a testator gives upon "trust, though he never adds a syllable to denote the "objects of that trust, or though he declares the trust in "such a way as not to exhaust the property, or though he "declares it imperfectly, or though the trusts are illegal, "still, in all these cases, as is well known, the legatee is "excluded, and the next of kin" or the heir "takes." In *Stead v. Mellor* (d) it was intimated that the precise words used in *Briggs v. Penny* were barely sufficient to indicate a clear intention to create a trust, but the principle above quoted was not questioned.

(4.) *The object of the trust must be lawful.*

Object must
be lawful.

The Court will not permit the system of trusts to be directed to any object that contravenes the policy of the law. Thus a trust of personalty cannot be limited to A. and his heirs, nor can it be entailed. If such words are used, they will vest an absolute interest in A. (e).

Mortmain
Acts, &c.

Similarly, trusts which contravene the Mortmain Acts, whether openly or secretly (f), or the law of perpetuities (g), or the policy of the law of bankruptcy (h), are void. Nor can property be settled on trust for illegitimate children to be thereafter born (i), nor on any trust adverse to religion or morality (k) or which savours of simony (l).

Court will
neither assist
cestui que trust
nor author of
the trust.

Where a trust is created for an unlawful or fraudulent purpose, the Court will neither enforce the trust in favour of the parties intended to be benefited, nor assist the

(c) 3 De G. & Sm. 525; 3 Mac. & G. 546.

(d) 5 Ch. D. 225.

(e) *Duke of Norfolk's Ca.*, 3 Ch. Ca. 9; 1 Vern. 164.

(f) *Way v. East*, 2 Drew. 44.

(g) *D. of Norfolk's Ca.*, *supra*.

(h) *Graves v. Dolphin*, 1 Sim. 66; *Higinbotham v. Holme*, 19 Ves. 88.

(i) *Medworth v. Pope*, 27 Beav. 71.

(k) *Thornton v. Howe*, 31 Beav. 14.

(l) *Cowper v. Mantell*, 22 Beav. 231.

settlor to recover the estate (*m*). But if the object be partly lawful and partly unlawful, and the Court can sever the two, it will hold good and execute the lawful part (*n*).

3. Power in the nature of a trust.

In addition to the cases in which upon words of recommendation a trust simply has been held to be created, there is another class of cases in which *powers* are given to persons, accompanied with such words of recommendation in favour of certain objects, as to invest them with the nature of trusts; so that if the donees fail to exercise such powers in favour of the specified objects, the Court will take upon itself to a certain extent the duties of the donees.

Power in nature of a trust.

Executed by the Court.

In order to induce the Court so to do there must be something more than a mere power of disposing (*o*); but if there appears, in connexion with the words creating the power, “a general intention in favour of a class, and a particular intention in favour of individuals of that class to be selected by another person, and the particular intention fails from that selection not being made, the Court will carry into effect the general intention in favour of the class” (*p*). In such a case the power is so given as to make it the duty of the donee to execute it, and the Court will not allow the objects to suffer from his negligence (*q*).

When.

Further, if in such a case a rule is laid down for the guidance of the donees of the power, which they do not act upon, the Court will act upon it, exercising the same judgment as the trustees should have done. In *Gower v. Mainwaring* (*r*), the trustees were to give the residue of the property to the testator’s friends and relations where

(*m*) *Cottingham v. Fletcher*, 2 Atk.

155; *Haigh v. Kaye*, 7 Ch. 473.

(*n*) *Mitford v. Reynolds*, 1 Ph.

185; *Re Birkett*, 9 Ch. D. 576;

Vaughan v. Thomas, 33 Ch. D. 187.

(*o*) *Brown v. Higgs*, 8 Ves. 561,

570.

(*p*) *Per Lord Cottenham*, in *Burrough v. Philcox*, 5 My. & Cr. 72.

(*q*) *Brown v. Higgs*, 8 Ves. 576; 5 My. & Cr. 92.

(*r*) 2 Ves. sr. 87.

they should see most necessity, and as they should see most equitable and just. On the surviving trustee refusing to act, the Court considered that it could follow the rule indicated and judge of the necessity. In the absence of such guidance, the Court would distribute the fund equally among the objects of the trust (*s*) on the principle that *equality is equity*. The same principle was followed in *Sahsbury v. Denton* (*t*), where a widow was directed to apply on her death part of a fund for a charity, the remainder to be at her disposal among the testator's relations in such proportions as she might be pleased to direct. The fund was equally divided, one-half being devoted to the charity, the other divided amongst the testator's next of kin capable of taking within the Statutes of Distribution.

Distinction
where there is
no express
gift to a class.

There is a distinction which should be noticed between those cases in which there is a gift to a class with a subsequent power of appointment amongst the class, and those in which there is no gift to the class except in or by means of the power; as, for instance, where there is a bequest to a wife for her own benefit, trusting that she will at her decease give and bequeath the same to the children. In the first case, the property vests until the power is exercised in all the members of the class, and in default of appointment they will all take (*u*). The property is, in other words, vested in the whole class, subject to be divested or revested by the exercise of the power. But in the second case, there being no primary gift to the class, that is, no gift to the children in express terms, those only can take in default of appointment who might have taken under an exercise of the power. Thus the issue of a deceased child, in the case given, would not take in default of appointment (*x*).

Time of
ascertaining

It is to be observed that where the donee of the power

(*s*) *Doyley v. Att.-Gen.*, 2 Eq. Ca. Ab. 194.

(*t*) 3 K. & J. 529.

(*u*) *Lambert v. Thwaites*, 2 Eq. 151.

(*x*) *Walsh v. Wallinger*, 2 Russ. & My. 78.

has a life interest in the fund, the class to take in default of appointment is determined by the state of facts at the death of the donee of the power (*y*). If he has not, it will be determined by the state of facts at the death of the donor of the power (*z*).

class depends on whether donee has a life interest or not.

II. *Executed and Executory Trusts.*

One of the most important of the sub-classifications of express trusts is that which distinguishes between executed and executory trusts. On this subject the leading authority is the case of

Distinction between executed and executory trusts.

GLENORCHY v. BOSVILLE.

[Ca. t. Talb. 3 ; 1 W. & T. L. C. 1.]

In this case A. devised real estate to his sisters B. and C., their heirs and assigns, upon trust until his granddaughter D. should marry or die to receive the profits, and thereout to pay her £100 a year for her maintenance; the residue to pay debts and legacies, and after payment thereof in trust for the said D.; and upon further trust, that if she lived to marry a Protestant of the Church of England, and at the time of such marriage were of the age of 21 or upwards, or, if under that age, such marriage were with the consent of the said B., then to convey the said estate with all convenient speed after such marriage to the use of the said D. for life, without impeachment of waste, remainder to her husband for life, remainder to the issue of her body, remainders over. It was held that though D. would have taken an estate tail had it been the case of an immediate devise, yet that the trust being executory was to be executed in a more careful and accurate manner;

(*y*) *Harding v. Glyn*, 1 Atk. 469.

(*z*) *Cole v. Wade*, 16 Ves. 27.

and that a conveyance to D. for life, remainder to her husband for life, remainder to their first and every other son, with remainder to the daughters, would best serve the testator's intent.

This case is the foundation of a long series of decisions in which the distinction between *executed* and *executory* trusts is recognised.

Definition of
executed
trust.

A trust is said to be *executed* when no further act is required to give effect to it, the terms of the trust being completely declared by the instrument creating it; as where an estate is conveyed or devised unto and to the use of A. and his heirs in trust for B. and the heirs of his body.

Executory
trust.

A trust is said to be *executory* when some further act must be done by the author of the trust or by the trustees to give effect to it, as in the case of marriage articles, which require a settlement to follow to declare fully the limitations of the trust, or as in the case of a will by which property is devised to trustees *upon trust to settle or convey* in a more perfect and accurate manner.

The distinction between an executed and an executory trust does not rest merely on the fact that the trustee may be required to execute some further instrument to give full effect to his trust. For instance, a mere direction to convey upon *certain specified trusts* will not render those trusts executory, so as to give to a Court of equity the latitude of construction which we shall see to be applicable in the case of executory trusts. The true distinction depends on the question whether the creator of the trust has been what is called his own conveyancer; whether, that is to say, "he has so defined his intention that you have nothing to do but to take the limitations he has given you, and convert them into legal estates," or has left it to the Court to make out from general expressions what his intention is (a).

(a) *Per* Lord St. Leonards, *Egerton v. Brownlow*, 4 H. L. 1, 210.

It is clearly established that in the case of executed trusts a Court of equity will construe technical words in the same manner as a Court of law would construe them when applied to legal estates. If, for instance, an estate is vested in trustees and their heirs in trust for A. for life without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder in trust for the heirs of A.'s body, the trust being executed, A. will, according to the rule in *Shelley's* case, take an equitable estate tail, just as he would have taken a legal estate tail in case similar words of limitation had been used in a conveyance direct to himself without the intervention of trustees (b).

Construction of executed trusts : equity follows the law.

In cases, however, of executory trusts where something is left to be done—viz., the trusts are left to be executed in a more careful and more accurate manner—a Court of equity does not consider itself bound to construe technical expressions with the same legal strictness. If, from the nature of the instrument or from the circumstances of the case, a contrary intention of the creator of the trust can be ascertained, the Court will, in supplying or directing the further act necessary for the execution of the trusts, mould the trusts according to such intention.

Construction of executory trusts depends on the instrument creating them.

The effects of the distinction between executed and executory trusts are most conspicuous in two classes of cases : 1. *Those arising under marriage articles.* 2. *Those arising under wills.* It is sometimes represented that these two classes of cases are treated on different principles. This is not strictly true. The principle in both cases is that the executory trusts are to be carried into execution in accordance with the intention of the creator of the trust. The difference between the two cases is that marriage articles from their very nature afford an indication of that intention, which is wanting in the case of a will. In the former the presumed object of the instrument is to

The principle is the same in wills as in articles :

viz., to follow the testator's intention ;

but in articles the intention may be inferred.

(b) *Wright v. Pearson*, 1 Eden, 119 ; *Austen v. Taylor*, *ibid.* 361.

Secus in wills. make provision for the issue of the marriage; in the latter there is no reason to suppose that a testator intends his beneficiary to take one quantum of interest rather than another, an estate for life rather than an estate in tail or in fee (*c*). If, however, even in the case of a will, it can be ascertained from the language employed that the testator did not mean to use the expressions he has employed in their strict technical sense, the Court in decreeing such settlement as he has directed, that is, in executing the executory trust, will so construe his words as to execute his intention (*d*). The precise nature of the contrast between the two cases will fully appear in the detailed separate consideration of executory trusts under marriage articles and those arising under wills.

I. Executory trusts under marriage articles.

Construction
of articles.
Real estate.

If, in articles before marriage, for making a settlement of the real estate of either the intended husband or wife, it is agreed that the same shall be settled upon the heirs of the body of them or either of them, in such terms as would, if construed with legal strictness according to the rule in *Shelley's* case, give either of them an estate tail, and so enable him or her to defeat the provision for the issue by barring the entail, Courts of equity, considering that the special object of the articles is to make provision for the issue of the marriage, will in conformity with the presumed intention of the parties, decree a settlement to be made upon the husband or wife for life only, with remainder to the issue of the marriage in tail as purchasers (*e*).

Issue treated
as purchasers.

When the words "heirs of the body," or "issue," are held to indicate an intention that the issue of the marriage should take as purchasers, a settlement will be decreed in favour of daughters as well as sons; thus the form of the limitation will be to the first and other sons successively in tail, with remainder to the daughters

Form of
limitation.

(*c*) *Rochford v. Fitzmaurice*, 2 Dr. & W. 1.

B. 369.

(*d*) *Blackburn v. Stables*, 2 V. &

(*e*) *Trevor v. T.*, 1 P. Wms. 622; *Streatfield v. S.*, ca. t. Talb. 176.

as tenants in common, with cross remainders between them (f).

Though the principle on which the Courts act in these cases is to make such provision for the issue of the marriage as it shall not be in the power of either parent to defeat, where articles are so framed that the concurrence of *both* parents is requisite in order to defeat the provision for the issue, the Court has refused to interfere, considering that it may have been the intention of the parties to the articles that the husband and wife should *jointly* have such power. And so, where it appears on the face of the articles that the parties themselves knew and made a distinction between limitations in strict settlement, and limitations leaving it in the power of *one* of the parents to bar the issue, a strict settlement of the whole will not be decreed (g).

Modifying circumstances.

Where words are used in articles which would, if interpreted strictly, create a joint tenancy among the children of the marriage, equity will decree a settlement upon them as tenants in common, either with provisions for limiting over the shares of any who die under age and without issue (h), or for making the interests of the children contingent on their attaining 21, being sons, or being daughters, attaining that age or marrying (i). But surrounding circumstances may modify the operation of this rule (k).

Tenancy in common preferred to joint tenancy.

It has been laid down that executory trusts in *post-nuptial* settlements will receive the same construction as executory trusts in wills (l).

Same rules apply to post-nuptial settlements.

Though a settlement ought to be executed in order to carry the executory provisions of marriage articles into effect, the Court has, where the property was personal, at the request of the parties, in order to save expense, made

Declaration in place of settlement.

(f) *Nandick v. Wilkes*, Gilb. Eq. Rep. 114.

(g) *Howel v. H.*, 2 Ves. sr. 358, 359.

(h) *Taggart v. T.*, 1 S. & L. 84, 89.

(i) *Young v. Macintosh*, 13 Sim. 445; *Cogan v. Duffield*, 2 Ch. D. 44, 50.

(k) *In re Bellasis' Trust*, 12 Eq. 218.

(l) *Rochford v. Fitzmaurice*, 1 C. & L. 158; 2 Dr. & W. 1, 19.

a declaration as to the true meaning of the articles, upon which the parties were able to act, without needing a formal instrument to be prepared and executed (*m*).

II. Executory trusts in wills.

(1.) As to real property.

In wills realty construed as at law, unless contrary intention apparent.

What amounts to indication of contrary intention.

Unless the intention of the testator appears from the will itself that he meant the words "heirs of the body," or words of similar import, to be words of purchase, Courts of equity will direct a settlement to be made according to the strict legal construction of those words; but if such an intention is apparent on the face of the will, the Court will give effect to it. The principles involved cannot be better illustrated than by comparing the cases of *Sweetapple v. Bindon* (*n*), and *Papillon v. Voice* (*o*). In the former, B. gave by will £300 to her daughter Mary to be laid out by her executrix in lands, and settled to the only use of her daughter Mary and her children, and if she died without issue, the land to be equally divided between her brothers and sisters then living. Lord Cowper said that had it been an immediate devise of land, Mary, the daughter, would have been by the words of the will tenant in tail: and in the case of a voluntary devise, the Court must take it as they found it, and not lessen the estate or benefit of the legatee; although upon the like words in marriage articles it might be otherwise. Here there was an executory trust indeed, inasmuch as the executrix was required to execute a settlement to give effect to the testatrix's intention; but, the instrument being a will, which conferred a benefit voluntarily on Mary, there was nothing to lead one to suppose that a lesser quantum of interest rather than a greater was intended to be conferred: therefore the Court had no ground for attributing to the words used any other than their strict legal meaning (*p*). In *Papillon v. Voice*, A. bequeathed a sum of money to trustees in trust

(*m*) *Byam v. B.*, 19 Beav. 53.
(*n*) 2 Vern. 536.

(*o*) 2 P. Wms. 471.
(*p*) *Scale v. S.*, 1 P. Wms. 290.

to be laid out in a purchase of lands and *to be settled* on B. for life, without impeachment of waste, remainder to trustees and their heirs during the life of B. to preserve contingent remainders, remainder to the heirs of the body of B., remainder over, with power to B. to make a jointure; and by the same will A. *devised lands* to B. for his life, without impeachment of waste, remainder to trustees and their heirs during the life of B. to support contingent remainders, remainder to the heirs of the body of B., remainder over. Lord Chancellor King declared as to that part of the case where lands were devised to B. for life, though said to be without impeachment of waste, with remainder to trustees to support contingent remainders, remainder to the heirs of the body of B., this last remainder was within the general rule, and must operate as words of limitation, and consequently create a vested estate tail in B.; but as to the other point, he declared the Court had a power over the money directed by the will to be invested in land, and that the diversity was where the will passed a legal estate, and where it was only executory, and the party must come to the Court in order to have the benefit of the will; that in the latter case the intention and not the rules of law must be followed; so that as to the lands to be purchased, they should be limited to B. for life, with power to B. to make a jointure, remainder to trustees during his life to preserve contingent remainders, remainder to his first and every other son in tail male successively, remainder over. It will be observed that the great distinction between this case and *Sweetapple v. Bindon* lay in the fact, that here the testator had divided his lands with which he intended to benefit B. into two parcels, one of which he devised to B. on certain limitations which were construed legally to carry an estate tail, and the other of which he directed to be settled on B. on the same limitations. This division afforded an index to the testator's intention, for there could have been no object in it if the limitations of both parcels were to be interpreted in the same way. There was here,

S.

E.

therefore, an indication of intention which was lacking in *Sweetapple v. Bindon*; and therefore the executory trust was interpreted, not strictly, as in that case, but in a manner similar to that in which it would have been treated had it occurred in marriage articles.

Particular
expressions.

There are many ways in which a testator may so indicate his intention as to lead the Court in construing an executory trust to depart from the strict legal signification of the words he employs; for instance, by instructing trustees to take "special care in such settlement that it shall not be in the power of A. to dock the entail of the estate given to him during his life" (q), or by directing that the heirs of the body or issue shall take "in succession or priority of birth," or that the settlement shall be made "as counsel shall advise," or "as executors shall think fit" (r); or again, "in such manner and form as that if A. should happen to die without leaving lawful issue, then that the property might descend after his death unincumbered" (s); so where a testator directed a conveyance to his daughter for her life, and so as she alone, or such person as she should appoint, should take the rents and profits, and so that her husband should not intermeddle therewith, and from and after her decease in trust for the heirs of her body for ever, Lord Hardwicke considered that as there was a plain intention to exclude the husband from all benefit, present or future interest, the words "heirs of her body" should be construed as words of purchase, and that the wife was entitled to a life estate only; because otherwise, if the wife predeceased her husband, he would get a considerable benefit contrary to the testator's intention, as tenant by the curtesy (t). It requires, however, a stronger case to lead the Court to this interpretation when the word "heirs" is used than it does when "issue" is

"Heirs" is a
stronger word
in favour of a
legal con-

(q) *Leonard v. E. of Sussex*, 2 H. L. 543.
Vern. 526.

(r) *White v. Carter*, 2 Eden, 366;
Bastard v. Proby, 2 Cox, 6; *Sack-*
ville-West v. Holmesdale, 4 L. R.

(s) *Thompson v. Fisher*, 10 Eq.
207.

(t) *Roberts v. Dixwell*, 1 Atk. 607.

the term employed, the word "heirs" being naturally a word of limitation (*u*). And where the trusts and limitations of land to be settled are expressly declared by the testator, the Court has no authority to make them different from what they would be at law (*x*).

In wills, as in marriage articles, when the words "heirs of the body" or "issue" are construed as words of purchase, they will be held to include daughters as well as sons, and the settlement will be decreed to be made in default of sons and their issue upon daughters as tenants in common in tail general, with cross remainders between them (*y*); and although, in the ordinary construction of a gift by will to a wife and children, they would take as joint tenants (*z*), where there has been a direction to secure the fund for the benefit of the wife and children, the Court has inferred an intention that the fund should be settled in the usual manner upon the wife for life, remainder to her children (*a*).

struction than
"issue."

Daughters
favoured
equally with
sons.

Children suc-
ceed to
parents,
rather than
take as joint
tenants.

Where in a *will* there are directions for a settlement in terms which are ordinarily construed to create a joint tenancy, the Court has no authority, as in the case of marriage articles, to vary them in execution by giving a tenancy in common in the settlement unless there is something to indicate that such was the intention (*b*).

(2.) As to personality.

Where chattels are given by will, and directed to go by reference to limitations of real estate in strict settlement or as heirlooms, either simply or "as far as the rules of law and equity will permit," Courts of equity will not, even though the legal estate be in executors, construe the trusts of the will as executory, so as to prevent the chattels vesting absolutely in the first tenant in tail upon his birth (*c*).

Personalty
usually vests
absolutely at
birth.

(*u*) *Meure v. M.*, 2 Atk. 265.

(*x*) *Austen v. Taylor*, 1 Eden, 361.

(*y*) *Bastard v. Proby*, *sup.*; *Trevor v. T.*, 13 Sim. 108; 1 H. L. 239.

(*z*) *Newell v. N.*, 7 Ch. 253, 256.

(*a*) *Combe v. Hughes*, 14 Eq. 415.

(*b*) *Marryat v. Townly*, 1 Ves. sr.

102; *Syngé v. Hales*, 2 Ba. & Be. 499.

(*c*) *Foley v. Burnell*, 1 Bro. C. C.

Contrary intention followed if expressed.

But if a plain intention be expressed that no person shall take the chattels absolutely who does not live to become entitled to the possession of the real estate, the Court will execute that intention (*d*). In a recent case a distinction was drawn between a bequest of specific chattels to E., "to be enjoyed and go with the estate," and a bequest of other chattels to trustees on trust to select and set aside certain of them "for the said E. and his successors to be held and settled as heirlooms and to go with the title." There was held to be an executory trust of the latter, but not of the former chattels (*e*).

III. The doctrine of *cy-pres*.

Execution *cy-pres*.

Where an executory trust in articles or in a will if carried literally into effect would be void for illegality, as by infringing the rule against perpetuities, the Court will, in order to carry the testator's intention into effect as far as possible, apply the principle of *cy-pres*, and direct a settlement to be made as strictly as the law will permit (*f*).

III. *Voluntary Conveyances and Trusts.*

The questions which arise in connexion with gifts, conveyances, and declarations of trust which are unsupported by consideration, are so numerous and so important as to require separate and careful investigation.

Distinction between gifts, unexecuted intentions to give, and voluntary trusts.
Gifts—

One of the most important questions which require attention in this connexion is the distinction between a gift, an intention to give which is not completely carried into effect, and the creation of a voluntary trust.

1. First, what is necessary to constitute a complete gift, or *donatio inter vivos*?

274; *Harrington v. H.*, 5 L. R. H. L. 87.

(*d*) *Potts v. P.*, 1 H. L. 671.

(*e*) *Cockerell v. E. of Essex*, 26 Ch. D. 538.

(*f*) *Humberston v. H.*, 1 P. Wms. 332; and see *Hampton v. Holman*, 5 Ch. D. 183; *Miles v. Harford*, 12 *ibid.* 691.

(1.) In order to effect a gift of lands, it is necessary that of land, the transfer should be effected by deed. A feoffment (unless made under a custom by an infant) is void without this evidence (*g*).

(2.) As to a gift of chattels, the best opinion seems to be of chattels, that it must either be perfected by delivery, or evidenced by deed (*h*). A mere verbal gift of a chattel to a person in whose possession it already is, has been held not to pass any property therein (*i*). There are, however, cases in which it has been considered sufficient to complete the gift that the conduct of the parties evidences a change of ownership (*k*). When such a gift is evidenced by deed without delivery, it is complete unless and until disclaimer by the donee (*l*), which may be by parol.

(3.) The delivery by the donor to the donee of securities of securities, transferable by delivery, with words of gift, and an intention on both sides to pass the property, constitutes a valid donation (*m*).

(4.) A gift of chattels may be made by a husband to his Between husband and wife, wife without the intervention of a trustee, but in order to establish an allegation of such a gift there must be clear and distinct evidence corroborative of the wife's testimony (*n*). The tendency of the Court is to regard slight circumstances as sufficient corroboration of the wife's claim where money which was originally her separate estate has come into her husband's power (*o*).

2. *Unexecuted intentions to give.*

There is a marked and important distinction between that class of cases in which a settlor without consideration creates a trust in favour of others, and those in which he

Unexecuted intentions to give.

(*g*) 8 & 9 Vict. c. 106, s. 3.
(*h*) *Irons v. Smallpiece*, 2 B. & Ald. 551, 552.

(*i*) *Shower v. Pilch*, 4 Exch. 478.

(*k*) *Flory v. Denny*, 7 Exch. 583;
Ward v. Audland, 16 M. & W. 862.

(*l*) *Siggers v. Evans*, 5 E. & B. 367.

(*m*) *M'Culloch v. Bland*, 2 Giff. 428; *Bromley v. Brunton*, 6 Eq. 275; *Hill v. Wilson*, 8 Ch. 888.

(*n*) *Grant v. G.*, 34 Beav. 623.

(*o*) *Rowe v. R.*, 2 De G. & S. 294; *Whittaker v. W.*, 21 Ch. D. 657.

has ineffectually attempted by an imperfect gift to confer his whole interest upon volunteers.

Mere promise
not enforced.

(1.) It is clear that a mere expression of intention to divide property with, or to leave it to others, or a mere promise to give, will not be enforced (*p*). The maxim *ex nudo pacto non oritur actio* is as applicable in equity as at law. No action will lie for the execution of an agreement which is not supported by consideration. And further, a consideration merely meritorious will not suffice, so that a voluntary covenant by a father to surrender copyholds to trustees for the benefit of his children was held to be wholly nugatory (*q*).

Clear evidence
of intention to
give will not
create a trust.

(2.) But where the donor has gone farther than that, and has actually taken some steps with a design of transferring his property, which steps are, however, ineffectual at law for that purpose, the question has arisen whether equity ought not in such circumstances to come to the assistance of the intended beneficiaries, and to give effect to the imperfect legal assignment by treating it as creating a trust of the property in their favour. This question has given rise to a great number of cases which it is not always easy to reconcile, but the general result of which is that *the most clear intention to confer a direct interest will not be sufficient of itself to create a trust in favour of a volunteer*.

Illustrations.
Antrobus v.
Smith.

Thus where a person endorsed upon the receipt for one of the subscriptions in the F. & C. Navigation Company,—"I hereby assign to my daughter B. all my right, title and interest of and in the enclosed call, and all other calls in the F. & C. Navigation Company," but never parted with the paper, the Court refused to hold that a trust was created. He might have assigned the property if he chose, but he did not; and there was no power to compel him to do so. His act amounted to some evidence of intention to

(*p*) *Dipple v. Corles*, 11 Ha. 183;
Lister v. Hodgson, 4 Eq. 30.

(*q*) *Jefferys v. J.*, Cr. & Ph. 138;
Green v. Patterson, 32 Ch. D. 95.

transfer the property, but there was a *locus pœnitentiæ* as long as the act was incomplete (r).

So where the obligee of a bond signed a memorandum not under seal, which was indorsed upon the bond, and purported to be an assignment thereof without consideration to a person to whom at the same time the bond was delivered, it was held that the gift being not complete, the Court could not give effect to it as a trust (s).

There are indeed some cases which seem to be inconsistent with the above rule, and which indicate an inclination to hold that to amount to a declaration of trust which according to ordinary rules of construction would amount only to an imperfect assignment (t). But the more recent and emphatic decision in *Richards v. Delbridge* (u) follows the more powerful current of authorities, and thus expresses their principle,—“*The true distinction seems to be plain and beyond dispute; for a man to make himself a trustee, there must be an expression of intention to become a trustee, whereas words of present gift show an intention to give over property to another, and not to retain it in the donor's own hands for any purpose, fiduciary or otherwise*” (x).

(3.) Where a voluntary instrument, although effecting no legal transfer of property, creates a valid legal obligation, equity will give effect to it (y). Thus where a person covenants, without consideration, to pay a sum of money, if the covenant is complete, and the Court is not called upon to do any act to make it perfect, it will give effect to a trust declared thereupon (z). This case is distinguishable from such as *Jefferys v. J.* (a), in that the Court was there asked to enforce a further act necessary at law to

There must be an intention to create a trust.

Richards v. Delbridge.

Where a valid legal obligation created, equity will give effect to it.

(r) *Antrobus v. Smith*, 12 Ves. 39; *Searle v. Law*, 15 Sim. 95.

(s) *Edwards v. Jones*, 1 My. & Cr. 226; *Dillon v. Coppin*, 4 *ibid.* 647.

(t) *Richardson v. R.*, 3 Eq. 686; *Morgan v. Malleon*, 10 Eq. 475.

(u) 18 Eq. 11.

(x) See also *Milroy v. Lord*, 4 De G. F. & J. 274; *Breton v. Woolven*, 17 Ch. D. 416.

(y) *Hall v. Palmer*, 3 Ha. 532; *Dawson v. Kearton*, 3 Sm. & Giff. 186.

(z) *Clough v. Lambert*, 10 Sim. 174.

(a) *Supra.*

Imperfect
testaments
not aided.

complete the obligation; namely, to surrender the copy-holds according to the voluntary covenant.

Where a paper is of a testamentary character, but invalid from want of proper execution, it cannot be enlarged or converted into a declaration of trust (*b*); and if a testator by will gives property upon trusts afterwards to be declared, he cannot make any valid declaration of such trusts, except by an instrument duly executed as a will or codicil. In the absence of such an instrument, the property would fall into residue (*c*).

Voluntary
trusts.

3. *Voluntary trusts.*

(1.) Where the plaintiff's claim rests not on the allegation of a gift, complete or incomplete, but of a trust created in his favour, it is clearly settled that when a trust is actually created, and the relation of *cestui que trust* established, a Court of equity will in favour of a volunteer enforce the execution of the trust against the person creating it and all subsequent volunteers; but it will not on behalf of volunteers interfere for the purpose of establishing the relationship of trustee and *cestui que trust* by creating a trust. The leading authority which expressly decides this point is

ELLISON v. ELLISON.

[6 Ves. 656; 1 W. & T. L. C. 273.]

The rule is sufficiently simple, but its application is often by no means free from difficulty, as it is frequently a question of much nicety to determine whether or not the relation of trustee and *cestui que trust* has been established.

Voluntary
trusts within
Statute of
Frauds.

It may be well, before considering in detail the cases which illustrate the principle, to remind the reader that voluntary trusts are, equally with others, within the purview of the Statute of Frauds. If lands are concerned,

(*b*) *Harriner v. Rogers*, 16 Eq. 340, 353.

(*c*) *Johnson v. Ball*, 5 De G. & Sm. 85.

therefore, such trusts must by s. 7 of that statute be evidenced by some writing; but a trust of pure personalty may be validly created by a parol declaration (*d*). In these cases, however, if doubt or difficulty arises respecting the words alleged to have been used, the Court may give weight to the suggestion that the words, not being committed to writing, may not express the deliberate sentiments of the party (*e*).

(2.) There seems at first sight to be but a narrow distinction between some cases where equity has given effect to such voluntary trusts, and those cases which have been described as imperfect gifts, in which the Court would not interfere on behalf of the would-be beneficiaries.

Narrow distinction between these trusts, and imperfect gifts.

In *Fortescue v. Barnett* (*f*), J. B. made a voluntary assignment by deed of a policy of assurance effected upon his own life to trustees upon certain trusts, and delivered the deed to one of the trustees. The grantor kept the policy in his own possession, and no notice of the assignment was given to the assurance office. It was held that an enforceable trust was created, since no act remained to be done by the grantor which, to assist a volunteer, the Court would not compel him to do. The facts and the result were similar in *Pearson v. Amicable Assurance Co.* (*g*). A comparison of these cases with *Edwards v. Jones* and *Richards v. Delbridge* (*h*) will show that while they agree in the fact that the action of the grantor was incomplete, they differ in the crucial fact that in the former the steps which were taken tended, though not complete, to the creation of a trust, while in the latter the intention evidenced did not point to a trust at all. The distinction is, in short, that already quoted from the judgment in *Richards v. Delbridge*.

The true distinction.

(3.) There are two ways in which a settlor may deal Two ways of

(*d*) *McFadden v. Jenkyns*, 1 Ph. 153; *Shenstone v. Brock*, 36 Ch. D. 541.

(*e*) *Dipple v. Corles*, 11 Ha. 183.

(*f*) 3 My. & K. 36.

(*g*) 27 Beav. 229; see also *Baddeley v. B.*, 9 Ch. D. 113; *Sewell v. King*, 14 Ch. D. 179.

(*h*) *Supra*, p. 55.

creating a voluntary trust.

i. Transfer of legal interest with trusts declared.

Locus pœnitentiae as long as trusts are not declared.

ii. Complete assignment of equitable interest.

with his property so as to create an irrevocable trust in favour of volunteers; and they are equally applicable, *mutatis mutandis*, whether his interest in the property is legal or merely equitable.

(i.) *Ellison v. Ellison* establishes that where there has been an actual *bonâ fide* transfer of a legal interest upon trusts declared in favour of volunteers, these trusts will be enforced in equity. It goes further, and is a clear authority for the proposition that the enforcement of the trusts will not be prevented by the fact that the legal estate by accident gets back into the hands of the donor, to whom if it were transferred by the trustees, they would be guilty of a breach of trust (i).

As long, however, as the trusts have not been determined by the settlor, notwithstanding a transfer to trustees, he has a *locus pœnitentiae*, and may call for a re-transfer of the legal estate, there being no remedy for or equity in the would-be *cestui que trusts* until the declaration of the terms of the intended trust (k).

(ii.) Similarly, if his estate be equitable, and he assigns his equitable interest without consideration, doing all that it is in his power to do to pass the property, the transaction is irrevocable. As to realty a contrary doctrine was indeed expressed in *Bridge v. B.* (l); but the subsequent case of *Gilbert v. Overton* (m), supported as it is by other authorities, among them the opinion of Lord St. Leonards (n), is to be regarded as of greater weight. As to personalty also, it was formerly held that an assignment under seal of that which did not pass at law by the operation of the assignment itself, unaccompanied by other acts, was no better than a covenant or agreement to assign, and was therefore not enforceable (o). But the case of *Keke-wich v. Manning* (p), speaking with the authority of the

(i) *M'Donnell v. Hesilrige*, 16 Beav. 346.

(k) *Re Sykes' Trusts*, 2 J. & H. 415.

(l) 16 Beav. 315, 327.

(m) 2 H. & M. 110, 117.

(n) Sugd. V. & P. 719, 14th ed.

(o) *Meek v. Kettlewell*, 1 Ha. 464, 474.

(p) 1 De G. M. & G. 176.

Lord Justice Knight Bruce and Lord Cranworth, must be considered as in effect overruling it.

(iii.) On the other hand, it is not necessary, in order to render a trust in favour of volunteers enforceable, that there should have been an actual transfer of the legal interest to trustees. It suffices if the settlor has constituted himself a trustee and declared the trusts (*q*).

iii. Settlor constitutes himself trustee, and declares trusts.

(iv.) And similarly, if the interest be equitable a valid trust may be created by the owner's direction to the trustees to hold the property in trust for the donee (*r*). Notice to the trustees in whom the legal estate is vested is necessary to protect the donee against third parties (*s*); but the trust is good as against the donor without it (*s*); nor is notice to the *cestui que trust* of the declaration of trust necessary (*u*).

iv. Directing trustees to hold on certain trusts.

Notice only necessary as against third parties.

(4.) When in any of these ways a trust is executed in favour of volunteers, it cannot afterwards, without good cause shown, be disturbed by the settlor (*v*). He is bound by his own act, and his deed will only be set aside on his establishing some good reason for the interference (*x*). The mere absence of a power of revocation in the deed, though the settlor's attention was not called to the fact, is no sufficient reason (*y*). But in case mistake (*z*) or fraud (*a*) can be shown, equity will interfere and rescind the transaction.

Mistake or fraud vitiates the transactions.

The main question to be decided in all the cases is that above quoted from the judgment in *Fortescue v. Barnett*, "whether any act remained to be done by the grantor which, to assist a volunteer, the Court would not compel him to do." And it should be remarked that this question is considerably affected by several recent statutes by

Doctrine affected by statutes.

(*q*) *Exp. Pye*; *Exp. Dubost*, 18 Ves. 140, 150.

(*r*) *Rycroft v. Christy*, 3 Beav. 238.

(*s*) *Donaldson v. D.*, Kay, 711.

(*u*) *Tait v. Leithead*, Kay, 658.

(*v*) *Paul v. P.*, 20 Ch. D. 743.

(*x*) *Henry v. Armstrong*, 18 Ch. D. 668.

(*y*) *Hall v. H.*, 8 Ch. 430; see also *James v. Couchman*, 29 Ch. D. 212.

(*z*) *Manning v. Gull*, 13 Eq. 485.

(*a*) *Chesterfield v. Janssen*, 2 Ves. sr. 125.

which many kinds of property have been made assignable at law which formerly were not so : *e. g.*, policies of life assurance by 30 & 31 Vict. c. 144, policies of marine assurance by 31 & 32 Vict. c. 86, debts and other legal choses in action by the Judicature Act, 1873, s. 25, sub-s. 6. It may well happen under these statutes that an incomplete assignment will be refused support, which, previous thereto, might have obtained it on the ground that the grantor had done all that he could do at law to pass the property. And it should further be observed that very slight circumstances will be regarded as amounting to a sufficient consideration to induce the Court not to treat a settlement as voluntary (*b*).

4. Statutory modifications.

Fraud on
creditors,
13 Eliz. c. 5.

(1.) By 13 Eliz. c. 5, "all covinous conveyances, gifts, "alienations of lands or goods, whereby *creditors* might be "in any way disturbed, hindered, delayed, or defrauded of "their just rights," are declared *utterly void*; but the Act is not to extend to any estate or interest in lands, &c., *on good consideration*, and *bonâ fide* conveyed to any person not having notice of such covin.

Fraudulent
intent, ex-
press, or im-
plied.

Hence a voluntary settlement of real or personal property may be set aside by a creditor of the settlor upon his showing an intent on the part of the settlor to delay, hinder, or defraud his creditors. This intent may be actual and express (*c*), or it may be inferred in different ways, as, for instance, by showing that the settlor was insolvent at the time of the settlement, or even that he was largely indebted (*d*), or that after deducting the settled property, sufficient available assets were not left for payment of the debts (*e*). To quote the words of Lord Hatherley in *Holmes v. Penny* (*f*), "The settlor must "have been at the time, not necessarily insolvent, but so

When im-
plied.

(*b*) See *Hewison v. Negus*, 16 Beav. 594; *Re Foster and Lister*, 6 Ch. D. 87.

(*c*) *Spirett v. Willows*, 3 De G. J. & S. 293.

(*d*) *Townsend v. Westcott*, 2 Beav. 340; *Taylor v. Cocnen*, 1 Ch. D. 636.

(*e*) *Freeman v. Pope*, 5 Ch. 538.
(*f*) 3 K. & J. 90.

"largely indebted as to induce the Court to believe that
 "the intention of the settlement, taking the whole trans-
 "action together, was to defraud the persons who, at the
 "time of the settlement, were creditors of the settlor."

It has been decided, however, that the protection of the Act is not limited to those who were creditors "at the time of the settlement." A deed designed to defraud future creditors, such as a settlement of all or nearly all his present and future property, especially by a person about to engage in trade, is void as against such creditors (*g*); and a prospective liability under a guarantee has been deemed sufficient to avoid a settlement which in the event left insufficient assets to meet the guaranteed debt (*h*).

Extends to future creditors.

A creditor may, by his concurrence with or acquiescence in a deed voidable under 13 Eliz. c. 5, preclude himself and his representatives from impeaching such deed (*i*), and an inquiry may be directed to ascertain whether any creditors of a settlor had so acquiesced (*k*).

Creditor's remedy lost by acquiescence.

A purchaser from a volunteer under a deed void under the statute will be preferred to the general creditors who have no specific charge (*l*).

Purchaser from volunteer preferred to creditor.

Choses in action, having since 1 & 2 Vict. c. 110, become available for the payment of debts under an execution, are within the statute (*m*).

Choses in action within the statute.

A voluntary deed executed *pendente lite* for the purpose of defeating any process in the nature of execution will be set aside in equity (*n*); and also a deed executed by one who knows that a decision is about to be pronounced against him (*o*).

Voluntary assurances *pendente lite* set aside.

(*g*) *Ware v. Gardner*, 7 Eq. 317;
Mackay v. Douglas, 14 Eq. 106;
Exp. Russell, 19 Ch. D. 588.

(*h*) *Ridler v. R.*, 22 Ch. D. 74.

(*i*) *Olliver v. King*, 8 De G. M. & G. 110.

(*k*) *Freeman v. Pope*, 9 Eq. 206, 212.

(*l*) *George v. Milbanke*, 9 Ves. 190.

(*m*) *Stokoe v. Cowan*, 29 Beav. 637.

(*n*) *Blenkinsopp v. B.*, 12 Beav. 568; 1 De G. M. & G. 495.

(*o*) *Barling v. Bishop*, 29 Beav. 417; and see *Exp. Mercer*, 17 Q. B. D. 290.

Deeds for
good consid-
eration, but
malâ fide.

It is to be observed that a deed founded on good consideration may be declared void under the statute if not made *bonâ fide*. But in such circumstances a stronger case must be made out than in that of a voluntary settlement. An *express* intent to defraud must in fact be proved (*p*). Where there was evidence of an intent to defeat and delay creditors, a settlement made in consideration of marriage was held to be not sustainable, the marriage itself being part of the fraudulent scheme (*q*). But a deed honestly meant as a family arrangement will be sustained (*r*).

Bankruptcy
Act, 46 & 47
Vict. c. 52.

(2.) The Bankruptcy Act, 1883 (*s*), contains provisions still more stringent against voluntary settlements than 13 Eliz. c. 5. By s. 47, which, differing in this respect from the corresponding section of the Act of 1869, includes non-traders as well as traders, any settlement not being (1) a settlement made before and in consideration of marriage; or (2) a settlement made in favour of a purchaser (*t*) or incumbrancer *bonâ fide* and for valuable consideration; or (3) a settlement made after marriage on the wife or children of the settlor of property accrued to him in right of his wife, is void against the trustee in bankruptcy if made within two years previous to the settlor's bankruptcy. And if the settlor becomes bankrupt within ten years after making a voluntary settlement except as above excepted, it will be void unless those claiming under it can prove (1) that the settlor was at the time of making the settlement able to pay all his debts without the aid of the settled property; and (2) that the settlor's interest in the property settled passed to the trustee of the settlement on the execution thereof.

Exceptions in.

Moreover by the same section an ante-nuptial covenant

(*p*) *Harman v. Richards*, 10 Ha. 89; *Exp. Ellis*, 2 Ch. D. 798; *Exp. Chaplin*, 26 ib. 319.

(*q*) *Columbine v. Penhall*, 1 Sm. & G. 228; *Bulmer v. Hunter*, 8 Eq. 46.

(*r*) *Golden v. Gillam*, 20 Ch. D. 389.

(*s*) 46 & 47 Vict. c. 52.

(*t*) Meaning buyer in the commercial sense. *Exp. Hillman*, 10 Ch. D. 622.

or contract to sell future property not being property in right of the settlor's wife is void against his trustee in bankruptcy unless the property has been actually transferred pursuant to the contract.

See also s. 48 of the Act as to the avoidance of conveyances in fraudulent preference of creditors.

(3.) By 27 Eliz. c. 4, it is enacted that every conveyance, grant, charge, lease, limitation of use of, *in, or out of any lands, tenements, or other hereditaments whatsoever*, for the intent and purpose to defraud and deceive such persons, &c., as shall purchase the said lands, or any rent or profit out of the same, shall be deemed only against such persons, their heirs, &c., who shall so purchase for money or any good consideration the said lands, &c., to be wholly void, frustrate, and of none effect.

Fraud on
purchasers.
27 Eliz. c. 4.

Thus a voluntary settlement of *lands*, including leaseholds, will be held void against subsequent purchasers for value from the settlor, including mortgagees (*u*), lessees (*x*), and trustees taking under settlements for valuable consideration (*y*), *even with notice* of the settlement (*z*); and it is no support to a settlement that it is a fair provision for a wife and children (*z*). Volunteers, moreover, cannot restrain their settlor from selling the settled estates (*b*). A judgment creditor is not deemed to be a purchaser within the Act (*c*).

Applies to
lands only.

Who are
purchasers.

A conveyance apparently voluntary may be supported by collateral evidence showing a contract for value (*d*).

A purchaser can only claim the protection of the statute when he purchases from the settlor himself. A conveyance for value by his heir or devisee will not avail against a *bonâ fide* settlement (*e*); nor will a conveyance for

(*u*) *Dolphin v. Aylward*, 4 L. R. H. L. 486.

(*x*) *Lewis v. Hopkins*, 9 East, 70, cited.

(*y*) *Watkins v. Steevens*, Nels. 160.

(*z*) *Doe v. Manning*, 9 East, 59.

(*b*) *Pulvertoft v. P.*, 18 Ves. 84; *Buckle v. Mitchell*, *ibid.* 100.

(*c*) *Beavan v. E. of Oxford*, 6 De G. M. & G. 507.

(*d*) *Pott v. Todhunter*, 2 Coll. 76; *Townend v. Toker*, 1 Ch. 446.

(*e*) *Lewis v. Rees*, 3 K. & J. 132.

value from one who claims under a second voluntary settlement (*f*).

Volunteers have no equity on purchase-money.

Where a voluntary settlement of land is avoided by a subsequent sale for valuable consideration, the volunteers have no equity against the purchase-money payable to the settlor (*g*). They would, of course, have a claim for damages under the settlor's covenant for quiet enjoyment if the settlement contained such a covenant.

Small consideration sufficient to support settlement against purchaser.

It should also here be mentioned that a small and inadequate consideration is sufficient to support a settlement against a purchaser (*h*). Thus, though leaseholds are within the Act, if a person takes them subject to onerous covenants, the liability so incurred is deemed a sufficient consideration to support his title against a subsequent purchaser (*i*). It has, however, been held that the principle of this case does not apply as against creditors (*k*).

Consideration of marriage.

There has been much discussion as to the sufficiency and scope of the consideration of marriage under this Act.

Valuable.

Marriage has always been recognized in both law and equity as a valuable consideration; and it is quite clear that an ante-nuptial written agreement, followed by marriage, puts the wife and children of the settlor in the position of purchasers within the statute (*l*). Whether a post-nuptial settlement made in consideration and pursuance of an ante-nuptial *parol* agreement is good as against a subsequent purchaser for value, even with notice, is doubtful (*m*). In the case of such a settlement made without referring to any previous agreement, though a previous agreement had been made by the husband while an infant,

Not supporting post-nuptial settlement.

(*f*) *Richards v. Lewis*, 11 C. B. 1035.

(*g*) *Daking v. Whimper*, 26 Beav. 568.

(*h*) *Bayspool v. Collins*, 6 Ch. 228, 232.

(*i*) *Price v. Jenkins*, 5 Ch. D. 619.

(*k*) *Ridler v. R.*, 22 Ch. D. 74; see also *Exp. Hillman*, 10 Ch. D. 622.

(*l*) *Kirk v. Clark*, Prec. in Ch. 275; *Teasdale v. Braithwaite*, 4 Ch. D. 85; 5 *ibid.* 630.

(*m*) *Dundas v. Dutens*, 2 Cox, 235; *Spurgeon v. Collier*, 1 Eden, 55; *Warden v. Jones*, 2 De G. & J. 76.

it was held that the settlement could not prevail against a subsequent purchaser (*n*), and it is clear that a mere post-nuptial settlement, without any ante-nuptial agreement, is void against a subsequent purchaser even with notice (*o*), though such a settlement will be supported on very slight consideration (*p*). We have seen (*sup.* p. 62) that if the marriage is part of a fraudulent scheme, it will not be treated as valuable consideration.

As to the scope of the marriage consideration, it has been held not to extend to collaterals, or the children of a future marriage (*q*). But children of a former marriage, and even a previously born illegitimate child of the wife, were held to be entitled as against a subsequent purchaser (*r*). But the same principle does not apply in the case of the second marriage of a widower, in favour of his children by the first marriage (*s*). A limitation in favour of collaterals, indeed, has been supported where there has been a party to the settlement who has purchased on their behalf (*t*).

Scope of the consideration.

The student should particularly observe that while 13 Eliz. c. 5, applies to *all* covinous conveyances, and thus includes chattels and choses in action as well as lands, 27 Eliz. c. 4, relates only to fraudulent conveyances of *lands* (leaseholds, however, included). Subsequent purchasers of chattels personal, therefore, have no remedy under the statute against a person claiming such under a prior voluntary settlement.

A voluntary settlement under either statute is only interfered with as far as the purposes of the statute in question require. It may be void against creditors in one

Voluntary settlements only affected as far as

(*n*) *Trowell v. Shenton*, 8 Ch. D. 318.

(*o*) *Butterfield v. Heath*, 15 Beav. 408.

(*p*) *Hewison v. Negus*, 16 Beav. 594; *Bayspoole v. Collins*, *sup.*; *In re Foster & Lister*, 6 Ch. D. 87. But see *Shurmur v. Sedgwick*, 24 Ch. D. 597.

(*q*) *Wollaston v. Tribe*, 9 Eq. 44; *Johnson v. Legard*, 3 Madd. 283.

(*r*) *Newstead v. Seawles*, 1 Atk. 265; *Clarke v. Wright*, 6 H. & N. 849; *Mackie v. Herbertson*, 9 App. C. 303.

(*s*) *Re Cameron & Wells*, 37 Ch. D. 32.

(*t*) *Heap v. Tonge*, 9 Ha. 104.

necessary for purposes of the statutes.

case, or purchasers in the other, but it is, nevertheless, valid against and irrevocable by the settlor or grantor himself. He can not only not set aside the settlement, but he cannot come into a Court of equity to enforce on an unwilling purchaser the specific performance of a contract for sale of an estate which he has previously settled (*u*), though the purchaser might so enforce the very same contract against him (*x*). It has, however, been decided that if the purchaser is willing to complete on a good title being shown, the vendor may get a decree (*y*).

Similarly, also, if only a part of the settled estate has been sold, and the settlement is set aside as to that part, it nevertheless remains good as to the remainder (*z*); and where a man by a voluntary deed, void against creditors, conveyed real estate for the benefit of his wife and children and afterwards became bankrupt, the surplus of the estate so settled was held bound by the trusts of the settlement (*a*).

5. *Trusts for the payment of debts.*

Trusts to pay debts.

Voluntary trusts for the payment of debts are of a peculiar character, and being regulated by principles quite distinct from those which have been above discussed, must be considered separately.

Revocable till communicated to creditors,

A legal transfer of property for payment of the debts of the owner, as long as it is not known or concurred in by the creditors, does not invest creditors with the character of *cestui que trusts*. It is considered merely as a direction to the trustees as to the method in which they are to apply the property vested in them for the benefit of the owner of the property, who alone stands in the relation of *cestui que trust*, and has the exceptional power of being able to *vary or revoke the trusts at his pleasure* (*b*). Until

(*u*) *Smith v. Garland*, 2 Mer. 123.
 (*x*) *Daking v. Whimper*, 26 Beav. 568; *Trowell v. Shenton*, 8 Ch. D. 318.
 (*y*) *Peter v. Nicolls*, 11 Eq. 391.
 (*z*) *Croker v. Martin*, 1 Bligh,

N. S. 573; 1 D. & C. 15.

(*a*) *French v. F.*, 6 De G. M. & G. 95.

(*b*) *Walwyn v. Coutts*, 3 Mer. 707; 3 Sim. 14.

some further step has been taken, the transaction is regarded as amounting to no more than a mandate, as where a man gives money to his servant or agent for the purpose of paying a debt, a proceeding which creates no right whatever in the creditor. The mere fact, therefore, of the existence of such a deed will not suffice to induce the Court to decree execution of the trust for the payment of debts (*c*).

If, however, such a settlement has been acted upon (*d*), or even if it has been communicated to the creditors, the trust is complete, and can no longer be revoked by the settlor, since the creditors, being aware of such a trust, might be thereby induced to a forbearance in respect of their claims which they would not otherwise have exercised, and after which it would be unjust to disappoint them (*e*). And if one of the creditors is made trustee for himself and the other creditors, and the assignment has been communicated to him and received his assent, it cannot afterwards be revoked by the assignor (*f*). Again, where property had been conveyed upon trust for payment of debts, to a person who was surety for some of the debts, though the creditors were neither parties nor privy thereto, the trustee was held entitled to retain it until discharged from his liability as surety (*g*). If also the trust has been communicated to some creditors, it would seem that it cannot, after their debts are satisfied, be revoked as to the remaining creditors (*h*).

Where a creditor is party to a deed whereby his debtor conveys property to a trustee to be applied in liquidation of the debt due to that creditor, the deed is as to him irrevocable; a valid trust in his favour is created (*i*); and

or acted upon; not so afterwards.

What is sufficient communication.

Creditor party to the deed.

- (*c*) *Ibid.*; *Garrard v. Lauderdale*, 1 Jo. & La. 606.
 3 Sim. 1; 2 Russ. & M. 451; *Acton* (*f*) *Siggers v. Evans*, 5 E. & B. 367.
v. Woodgate, 2 My. & K. 492;
Johns v. James, 8 Ch. D. 744. (*g*) *Wilding v. Richards*, 1 Coll. 655.
 (*d*) *Cosser v. Radford*, 1 De G. J. 585. (*h*) *Griffith v. Ricketts*, 7 Ha. 307.
 (*e*) *Acton v. Woodgate*, 2 My. & K. 492, 495; *Broune v. Cavendish*, (*i*) *Mackinnon v. Stewart*, 1 Sim. N. S. 88.

what is true where a single creditor is *cestui que trust*, is of course equally so where there are many such. It suffices also if a creditor is party to a deed, though in another right than as *cestui que trust* for the amount of his debt (*k*). In a case where an assignment was made to a trustee for the benefit of creditors, but no creditor was aware of such assignment, it was held that the trustee might sue in equity against a third party to recover property of the settlor outstanding in such third party (*l*).

Though there is a time limited in the deed within which creditors are directed to execute it, yet if by accident any of them fail to do so, they will not necessarily lose the benefit of the trusts, if they eventually act under or upon the faith of the deed, or acquiesce in it (*m*).

Long delay to execute deed or conduct opposed to the deed bars creditor's claim.

A creditor, however, who for a long time delays (*n*), or who refuses to execute the deed, and does not retract his refusal within the time limited (*o*), and *a fortiori* if he sets up a title adverse to the deed (*p*), will not be allowed to claim the benefit of its provisions. And generally the Court, before it permits a creditor to claim the benefit of a deed, will see that he has performed all the fair conditions of the deed; and if he has taken any step inconsistent therewith, he will be deprived of all advantage therefrom (*q*).

By s. 4 of the Bankruptcy Act, 1883 (*r*), it constitutes an act of bankruptcy to make a conveyance or assignment of property to a trustee for the benefit of creditors generally; and by 50 & 51 Vict. c. 57, s. 4, any such deed made after 31st December, 1887, is void, unless registered as prescribed by the Act, within seven days from its execution.

(*k*) *Montefiore v. Brown*, 7 H. L. 241, 266.

(*l*) *Glegg v. Rees*, 7 Ch. 71.

(*m*) *Raworth v. Parker*, 2 K. & J. 163; *In re Baber's Trusts*, 10 Eq. 554.

(*n*) *Gould v. Robertson*, 4 De G. & Sm. 509.

(*o*) *Johnson v. Kershaw*, 1 De G. & Sm. 260.

(*p*) *Watson v. Knight*, 19 Beav. 369; *Meredith v. Facey*, 29 Ch. D. 745.

(*q*) *Field v. Donoughmore*, 1 Dru. & W. 227.

(*r*) 46 & 47 Vict. c. 52.

SECTION III.—RESULTING TRUSTS.

Definition and Classification.

- I. *Parting with Legal and retaining Equitable Interest.*
- II. *Purchase in name of Third Persons.*
- III. *Exceptions.*
Presumption of Advancement.
Dyer v. Dyer.
- IV. *Joint Purchases.*
Lake v. Gibson.

Where the owner of property so deals with it that equity Definition.
presumes an intention on his part to sever the legal from the
equitable or beneficial interest, it gives effect to such presumed
intention by applying the principle of trusts. These trusts
are termed Resulting (or, by some authors, Implied) trusts.

There are two leading classes of resulting trusts. First, Classification.
where an owner parts with the legal estate by conveyance,
devise, or bequest, and equity presumes that he had no
intention to part with the equitable interest. Secondly,
where a purchaser directs a conveyance of the legal estate
to be made to a third person, but equity presumes an in-
tention to acquire the equitable interest for himself.

I. *Resulting trusts where an owner parts with the legal*
interest intending to retain the equitable.

The inquiry suggested by this class of cases is, on what
grounds the Court will now hold that a settlor or testator
did not intend to part with the equitable interest.

On what
grounds in-
tention to
retain equi-
table interest
is presumed.

Express intention.

(1.) Where such intention is expressed.

The clearest case is where an intention not to benefit the grantee, devisee, or legatee is actually expressed upon the instrument which transfers the legal estate.

If no trust specified, it results to settlor

We have already seen that where a trust is evidently intended to be created, the person into whose hands the legal estate is transferred cannot hold it beneficially (p. 40). Thus, where a bequest is made to a person "upon trust," and no trust is declared (*r*), or the trusts declared are too vague to be executed (*s*), or are void for unlawfulness (*t*), or fail by lapse (*u*), the trustee can have no pretence for claiming the beneficial ownership, the whole property being clearly impressed with a trust. In such cases, therefore, the trust will result to the settlor or his representatives, the heir as to realty, the next of kin as to personalty; and the trustee cannot defeat the resulting trust by parol evidence in his favour (*x*).

or his representatives.

Presumed intention.

(2.) Where the intention is presumed.

(i.) It was an ancient and well known principle of equity before the Statute of Uses, that when a feoffment of real estate was made to a person without consideration, the use at once resulted to the feoffor, and in equity he continued to enjoy the beneficial interest. The same principle is still applicable, but, as we shall see, upon somewhat different terms from those which were anciently regarded with respect to uses. Formerly, a consideration, however trifling, was sufficient to entitle the feoffee to the use of the lands of which he was enfeoffed. Modern equity, however, makes a wider inquiry than as to the mere payment or non-payment of a nominal consideration, before it decides as to the title to the beneficial enjoyment; and it

Resulting uses

contrasted with modern trusts.

(*r*) *Dawson v. Clarke*, 18 Ves. 247, 254; *Barry v. Fowke*, 2 H. & M. 60.

(*s*) *Fowler v. Garlike*, 1 R. & M. 232; *Leavers v. Clayton*, 8 Ch. D. 584.

(*t*) *Carriek v. Errington*, 2 P. Wms. 361.

(*u*) *Ackroyd v. Smithson*, 1 Bro. C. C. 503, *et infra*, p. 461, *et seq.*

(*x*) *Langham v. Sanford*, 17 Ves. 442; 19 *ib.* 643; *Irvine v. Sullivan*, 8 Eq. 673.

is especially vigilant to observe any indications of fraud or mistake having affected the transaction (*y*).

(ii.) Perhaps the most important class of cases under this head are those in which a settlor conveys property on trusts which do not exhaust the whole property. In such cases generally there will be a resulting trust in favour of the settlor of so much of the property as is unaffected by the trust declared (*z*).

Where declared trusts do not exhaust the property.

With respect, however, to gifts to charities, there are certain special rules which must be observed (*a*).

Special rules as to charities.

Where a person makes a valid gift, whether by deed or will, and expresses a *general* intention of charity, but either particularises no objects (*b*), or such as do not exhaust the proceeds (*c*), the Court will not suffer the property in the first case, or the surplus in the second, to result to the settlor or his representative, but will take upon itself to execute the general intention, by declaring the particular purposes to which the fund shall be applied.

No resulting trust where a general intention of charity expressed;

Where a person settles lands, or the rents and profits of lands, to purposes which at the time exhaust the proceeds, but in consequence of an increase in the value of the estate an excess of income subsequently arises, the Court will order the surplus, instead of resulting, to be applied in the same or a similar manner with the original amount (*d*).

nor where trusts declared at the time exhaust the proceeds.

But even in the case of a charity, if the settlor do not give the land or the whole rents of the land, but, noticing the property to be of a certain value, appropriates part only to the charity, the residue will then, according to the circumstances of the case, either result to the heir-at-law (*e*), or if the donee be itself an object of charity (as

But trust results where all is not at first disposed of.

(*y*) *Birch v. Blagrave*, Amb. 264; *Lloyd v. Spiljet*, 2 Atk. 150. As to the doctrine of advancement, see *Dyer v. Dyer*, *infra*, p. 75.

(*z*) *Parnell v. Hingston*, 3 Sm. & G. 337, 344.

(*a*) *Lewin*, 8th edit., p. 155.

(*b*) *Att.-Gen. v. Herrick*, Amb. 712.

(*c*) *Att.-Gen. v. Tonner*, 2 Ves. jr. 1.

(*d*) *Beverley v. Att.-Gen.*, 6 H. L. 310.

(*e*) *Att.-Gen. v. M. of Bristol*, 2 J. & W. 308.

in the case of a charitable corporation) will belong to the donee subject to the charge (*f*).

Contrast between charge and trust for special purposes.

(iii.) The distinction must be observed between a devise to a person for a particular purpose with no intention of conferring a beneficial interest, and a devise with a view of conferring a beneficial interest, but subject to a particular direction. If a testator gives to A. and his heirs all his real estate charged with his debts, that is a devise which includes a particular purpose, but is not restricted to it. The devisee, therefore, takes the beneficial interest subject to the debts; but if the testator devises all his real estate to A. and his heirs upon trust to pay his debts, that is a devise solely for a particular purpose, with no intention to confer a beneficial interest. If there be any surplus, therefore, after payment of the debts, it results to the heir of the testator (*g*).

Parol evidence as to deeds *inter vivos* admissible to rebut the presumption.

(3.) This species of resulting trust being dependent upon presumption of law, may be rebutted as to instruments *inter vivos* by parol evidence of the settlor's intention (*h*).

For the extensive class of resulting trusts which depend upon the doctrine of conversion, and which would in a strict classification be here treated of, see *infra*, p. 461 *et seq.*

II. *Purchases in the Names of Third Persons.*

Where purchaser takes a conveyance in name of a third person. Illustrated.

(1.) The second order of resulting trusts comprises those which arise when a person purchases an estate but takes a conveyance in the name of another person.

The general principle on which they rest may be thus illustrated. Suppose A. advances the purchase-money of

(*f*) *Beverley v. Att.-Gen.*, 6 H. L. 272.

310; *Att.-Gen. v. South Moulton*, 5 H. L. 1.

(*g*) *King v. Denison*, 1 V. & B.

(*h*) *Cook v. Hutchinson*, 1 Keen, 42, 50; *Fowkes v. Pascoe*, 10 Ch. 343.

a freehold, copyhold, or leasehold estate, and a conveyance, surrender, or assignment of the legal interest in it is made either to B., or to B. and C., or to A., B. and C., jointly or successively; *in all these cases if B. and C. are strangers, a trust will result in favour of A.* The doctrine applies equally to real and personal property (*i*).

In connexion therewith it will be convenient first to consider some important rules of evidence respecting these trusts.

(2.) General rules of evidence.

(i.) If the advance of the purchase-money by the real purchaser does not appear on the face of the deed, and even if it is stated to have been by the nominal purchaser, parol evidence is admissible to prove by whom it was actually made (*k*), resulting trusts being, by s. 8, expressly excepted from the operation of the Statute of Frauds.

When parol evidence admissible to prove by whom purchase-money is paid.

But where the trust does not arise on the face of the deed itself, the parol evidence must prove the fact of the advance of the purchase-money very clearly (*l*); and doubt has been expressed whether such evidence is admissible after the death of the nominal purchaser (*m*). It is not, however, easy to see how his death affects the principle (*n*). If the nominal purchaser admits the payment of the money by the real purchaser, a trust will doubtless result (*o*); and where he, by answer to a bill, denied such payment, parol evidence was admitted to contradict him (*p*).

In a case in which a defendant purchased an estate in his own name with his own money, and the plaintiff alleged that he did so as agent for him, which the defendant denied, parol evidence tendered by the plaintiff to prove a verbal agreement constituting the agency was rejected, on

(i) *Sidmouth v. S.*, 2 Beav. 447, 454.

(k) *Peachey's Case*, Sugd. V. & P. 910, 11th ed.

(l) *Gascoigne v. Thwing*, 1 Vern. 366; *Willis v. W.*, 2 Atk. 71.

(m) *Sanders on Uses*, 1, 354, 5th ed.; *Chalk v. Danvers*, 1 Ch. Ca. 310.

(n) *Lench v. L.*, 10 Ves. 511, 517.

(o) *Ryal v. R.*, 1 Atk. 58.

(p) *Gascoigne v. Thwing*, *sup.*

the ground that such a case was not within the exception of the statute, since no trust there arose by operation of law, but it was sought to raise one by parol evidence of an agreement (*q*). But this decision has been questioned as being inconsistent with the principle that the Statute of Frauds is not to be made an instrument of fraud (*r*).

To prove purchase with trust money.

(ii.) Parol evidence is admissible to prove that a purchase has been made with trust money, and upon that being proved a trust will result in favour of the *cestui que trust*, the real owner of the money (*s*).

To show intention of advancement.

(iii.) Since resulting trusts arise from equitable presumption, they may be rebutted by parol evidence which shows an intention in the person advancing the purchase-money that the person to whom the property was transferred should take for his own benefit (*t*); and such an intention existing at the time of the purchase cannot be subsequently altered (*u*). Resulting trusts may also be rebutted as to part and prevail as to the other part, as where an intention is proved to confer a life interest on the nominee (*x*).

Presumption rebutted in part.

Evidence of interested parties.

(iv.) Parol evidence of interested parties is admissible to rebut a resulting trust, but in order to be sufficient for that purpose it must be at least corroborated by surrounding circumstances (*y*).

Acquiescence.

(v.) The presumption of a resulting trust will be rebutted by acquiescence for a considerable time in the enjoyment of the property by the person in whose name it was purchased (*z*).

Express trust evidenced.

(vi.) And where there is an express trust declared upon a purchase made in names of strangers, though but by parol, there can be no resulting trust; for resulting trusts,

(*q*) *Bartlett v. Pickersgill*, 1 Eden, 515.

(*r*) *Heard v. Pilley*, 4 Ch. 548.

(*s*) *Lench v. L.*, 10 Ves. 511.

(*t*) *Goodright v. Hodges*, 1 Watk. Cop. 227, Lofft. 230; *Redington v. R.*, 3 Ridg. P. C. 178.

(*u*) *Groves v. G.*, 3 Y. & J. 163,

172; *Standing v. Bowring*, 27 Ch. D. 341; 31 *ib.* 282.

(*x*) *Lane v. Dighton*, Amb. 409; *Fowkes v. Pascoe*, 10 Ch. 343.

(*y*) *Fowkes v. Pascoe*, *sup.*

(*z*) *Delane v. D.*, 7 Bro. P. C. 279; *Clegg v. Edmondson*, 8 De G. M. & G. 787.

though excepted from the Statute of Frauds, were only left as they were before the Act, and a bare parol declaration before the Act would have prevented any resulting trust (a).

III. *Exceptions from the General Rule in such Purchases.*

1. There will be no resulting trust where the policy of an Act of Parliament would be thereby defeated. Thus it was held that no trust resulted in favour of a person advancing the purchase-money of a ship registered in the name of another, for the register, according to the policy of the old Registry Acts, was conclusive evidence of ownership both at law and in equity (b).

Where it would contravene an Act of Parliament.

On a similar principle, a trust will not, it seems, result in favour of a person who has purchased an estate in the name of another in order to give him a vote in electing a member of Parliament (c). Where, moreover, a person having deposited moneys in a savings bank up to the full amount allowed by statute, made further deposits to an account in his own name in trust for his sister, giving her no notice of the investment, it was held that the only intention being to evade the Act of Parliament, no trust was created, and the claim of the sister was refused (d).

2. **Presumption of Advancement.**

A more important class of cases is that which springs from the doctrine of advancement. On this a leading authority is

Presumption of advancement.

DYER v. DYER.

[2 Cox, 92; 1 W. & T. L. C. 223.]

There copyholds were granted to A. and B. his wife and

(a) *Bellasis v. Compton*, 2 Vern. 294; *Ayerst v. Jenkins*, 16 Eq. 275.

(b) *Exp. Gallop*, 15 Ves. 60, 68.

(c) *Groves v. G.*, 3 Y. & J. 163, 175.

(d) *Field v. Lonsdale*, 13 Beav. 78.

C. his younger son to take in succession for their lives and the life of the survivor. The purchase-money was all paid by A. Nevertheless C. being a son of A. was held not to be a trustee of his life interest for A., but to take beneficially, *the presumption being that the purchase was intended by the father to effect an advancement of the son.*

General rule
in favour of
children,

(1.) The general rule applying equally to real and personal property is that where a purchase is made in the name of a child there will *prima facie* be no resulting trust for the parent, but, on the contrary, a presumption arises that an advancement was intended. For this *Dyer v. Dyer* is a very strong authority, since there the purchaser had given some indication of an intention contrary to advancement by having actually devised the purchased property (e).

or where
donor stands
in loco
parentis,

(2.) The presumption of advancement arises not only in favour of children, but also in that of persons towards whom the purchaser has put himself *in loco parentis*. Thus an illegitimate child (f), a grandchild (g), and the nephew of a wife (h), and many others in similar circumstances, have been held entitled to the benefit of property purchased in their name. In the case of a grandchild, however, it is important to inquire whether his father is living, as it has been held that if so the *locus parentis* of the grandfather will not avail to raise the presumption (i).

or of a wife.

(3.) The presumption also arises in favour of a wife (k); and also where there has been a purchase in the joint names of the purchaser, his wife, and a stranger (l).

But there is no similar presumption if the purchaser stands merely *in loco mariti*, and has purchased in the name of a woman with whom he has been cohabiting (m),

(e) *Finch v. F.*, 15 Ves. 43; *Sidmouth v. S.*, 2 Beav. 454.

(f) *Beckford v. B.*, Lofft. 490.

(g) *Ebrand v. Dancer*, 2 Ch. Ca. 26.

(h) *Curran v. Jago*, 1 Coll. 261.

(i) *Tucker v. Burrow*, 2 H. & M. 515.

(k) *Kingdon v. Bridges*, 2 Vern. 67.

(l) *Re Eykyn's Tr.*, 6 Ch. D. 115.

(m) *Rider v. Kidder*, 10 Ves. 360.

or has illegally gone through the form of marrying, such as a deceased wife's sister (*n*).

Where a purchase is made by a married woman out of her separate estate in the names of her children, it may be open to question whether, under the present law, there would be deemed to be a presumption of advancement. Previous to the recent Acts relating to married women, it is clear that there was no such presumption (*o*), a mother being then under no legal obligation to provide for her children. And though by the Married Women's Property Act of 1870 (*p*) a married woman having separate property was rendered liable for the maintenance of her children *as a widow was liable*, it was still held that no presumption of advancement arose in the absence of other evidence of such intention (*q*), the liability of the mother being still of a lower nature than that of a father. Now by s. 21 of the Married Women's Property Act, 1882 (*r*), a married woman having separate property is rendered subject to all such liability for the maintenance of her children *as the husband is* by law subject. But the principle of *Bennet v. B.* (*q*) would seem to be still applicable, and it is submitted that even now there would be no presumption of advancement. It is doubtful on the authorities whether the doctrine is applicable to the case of a widow (*s*); and certainly if it would not be applied as between a mother and her children, *a fortiori* it would not in the case of a purchase by a wife in the name of her husband. It is, however, most important to observe that in all such cases, if apart from the relationship *an intention to advance is proved*, there is no resulting trust (*t*).

Not where a mother purchases in the name of a child,

or of a husband.

Where a contract is entered into to purchase real property in the name of a child, although the child, being a

Vendor must convey to a child if

(*n*) *Soar v. Foster*, 4 K. & J. 152.

(*o*) *Re De Visme*, 2 De G. J. & S.

(*p*) 33 & 34 Vict. c. 93.

(*q*) *Bennet v. B.*, 10 Ch. D. 474.

(*r*) 45 & 46 Vict. c. 75.

(*s*) *Sayre v. Hughes*, 5 Eq. 376;

Batstone v. Salter, 10 Ch. 431; but

cf. Bennet v. B., *sup.*

(*t*) *Beecher v. Major*, 2 D. & Sm. 431.

purchase is
in his name.

volunteer, could not sue for specific performance of the contract, nevertheless, if the vendor enforces the contract, the conveyance must be made to the child (*u*). And of course the same principle applies to a wife, and in the case of a joint contract (*v*). But if the father or husband is liable only as a surety for the debt there is no resulting trust (*x*).

Circumstances
formerly
rebutting the
presumption
do not so now.

3. Many circumstances have been taken into consideration as rebutting the presumption of advancement; but most of those formerly of weight are not now regarded. Thus at one time the infancy of the child was a circumstance against the purchase being considered an advancement; at present it tells strongly in the opposite direction (*y*). Again, it was once an argument against advancement that the property purchased was reversionary, and therefore not a proper provision for a child; but this would not now be of any avail (*z*). Lord Hardwicke regarded a purchase in the joint names of the parent and child as a weaker case for advancement than a purchase in the name of a son alone (*a*). Such a circumstance would now have little if any weight. The stranger, in such a purchase, would hold his share in trust for the father; the child would be considered advanced to the extent of his interest (*b*).

Presumption
rebutted if
child fully
advanced.

If a child has been already fully advanced, this affords an objection to the presumption, and the child *may* be held a trustee for its father; but such a circumstance is by no means conclusive (*c*). Partial advancement is of no weight against a child (*d*). It has been sometimes regarded as evidence of the absence of intention to advance, if the father remains in receipt of the rents or profits of the estate or fund purchased. The objection is, however, now

(*u*) *Redington v. R.*, 3 Ridg. P. C. 196.

(*v*) *Drew v. Martin*, 2 H. & M. 130; *Vance v. V.*, 1 Beav. 605.

(*x*) *Whitehouse v. Edwards*, 37 Ch. D. 683.

(*y*) *Lamplugh v. L.*, 1 P. Wms. 111; *Finch v. F.*, 15 Ves. 43.

(*z*) *Rumboll v. R.*, 2 Eden, 15, 17; *Williams v. W.*, 32 Beav. 370.

(*a*) *Pale v. P.*, 1 Ves. sr. 76.

(*b*) *Grey v. G.*, 2 Swanst. 594, 599; *Dummer v. Pitcher*, 2 My. & K. 262, 272.

(*c*) *Hepworth v. H.*, 11 Eq. 10.

(*d*) *Redington v. R.*, *sup.*

without weight, certainly if the child is an infant (*e*), and apparently also if he is adult, unless strengthened by the additional circumstance of his being already fully advanced (*f*).

Where an advancement is made by a person largely indebted at the time, it will be void as against creditors under 13 Eliz. c. 5 (*g*); but 27 Eliz. c. 4, has no similar application in favour of purchasers (*h*).

Advancement void against creditors.

And where the relation of client and solicitor subsists between the parent and child, the ordinary presumption in favour of advancement will be excluded, and the burden of proving its validity will be thrown on the son acting as solicitor (*i*).

Child solicitor for the parent.

Where a father makes a purchase in the name of a son, of property which is attended with risk of loss, the Court may on the part of the son repudiate his interest, in which case the father remains liable (*k*).

Son may repudiate onerous property.

In a case of advancement, where part of the purchase-money remains unpaid, it is a debt payable out of the assets of the father (*l*).

Unpaid purchase-money payable out of father's assets.

4. Rules of evidence as to presumption of advancement.

(1.) The presumption of advancement may be rebutted by evidence of facts showing the father's intention that the son should take the property as a trustee, and not for his own benefit. Such facts must, however, have taken place *antecedently to, or contemporaneously and in immediate connexion with, the same transaction* (*m*). For instance, if there is, on the purchase, an immediate and formal taking possession by the father, as by entering into a shop and putting his name over the door, that would be sufficient

Evidence to rebut the presumption.

Contemporaneous acts of father.

(*e*) *Loyd v. Reid*, 1 P. Wms. 688.

(*f*) *Grey v. G.*, 2 Swanst. 594, 600.

(*g*) *Christy v. Courtenay*, 13 Beav. 96.

(*h*) *Drew v. Martin*, 2 H. & M. 130, 133.

(*i*) *Garrett v. Wilkinson*, 2 De G. & Sm. 244.

(*k*) *Reid's Case*, 24 Beav. 318; *Weston's Case*, 5 Ch. 614.

(*l*) *Skidmore v. Bradford*, 8 Eq. 134.

(*m*) *Grey v. G.*, *supra*; *Col-linson v. C.*, 3 De G. M. & G. 409.

to establish ownership in the father and trusteeship in the son (*n*).

Subsequent acts not admissible.

Subsequent acts, however, are not admissible in evidence against the son's interest. Thus a devise as in *Dyer v. Dyer*, or a mortgage (*o*), or other such disposition of the property is of no avail (*p*).

Parol declarations contemporaneous; not subsequent.

(2.) The presumption of advancement may also be rebutted by evidence of parol declarations of the father contemporaneous with the purchase; but not of any declarations made subsequently (*q*).

Evidence to support the presumption.

(3.) *A fortiori* parol evidence may be given by the son to show the intention of the father to advance him, such evidence being in support of both the legal interest of the son, and the equitable presumption (*r*).

Acts and declarations of father subsequent.

(4.) The acts and declarations of the father subsequent to the purchase, though not admissible in his favour, are admissible against him in favour of the son (*s*), and it seems that subsequent acts and declarations of the son can be used against him by the father; though they would not be sufficient to counteract clear evidence of the father's original intention to advance the son (*t*).

Evidence showing fraud on the law not admissible for the father.

(5.) The father may not tender evidence in support of the trust, the effect of which would be to show that the transfer was intended to effect a fraud on the law, such as a conveyance of lands to the son for the purpose of qualifying him for an office or a vote (*u*).

Surrounding circumstances considered.

(6.) Any surrounding circumstances may be taken into consideration to rebut the presumption of advancement. Thus, where a husband pays money into a bank to an account opened in his wife's name, and it appears that the account was opened for convenience sake, the intention

(*n*) *Stock v. M'Avoy*, 15 Eq. 55, 59.

(*o*) *Bach v. Andrew*, 2 Vern. 120.

(*p*) *Murless v. Franklin*, 1 Swanst.

13. (*q*) *Elliott v. E.*, 2 Ch. Ca. 231;

Sidmouth v. S., 2 Beav. 447, 456.

(*r*) *Lamplugh v. L.*, 1 P. Wms.

113.

(*s*) *Redington v. R.*, 3 Ridg. P. C. 195, 197.

(*t*) *Sidmouth v. S.*, *sup.*; *Jeans v. Cooke*, 24 Beav. 513, 521.

(*u*) *Childers v. C.*, 3 K. & J. 310; *May v. M.*, 33 Beav. 81.

being not to give the wife any interest in the money, but to enable her to act as agent, the money will remain the property of the husband (*x*). In another case, where it was considered that the transfer of the husband's account into the joint names of himself and his wife was made in order to enable the wife to draw cheques, the same conclusion was reached (*y*).

IV. *Resulting Trusts arising from Joint Purchases.*

The principal authority on this species of resulting trusts is

LAKE v. GIBSON.

LAKE v. CRADDOCK.

[3 P. Wms. 158; 1 W. & T. L. C. 200.]

In this case five persons purchased an estate as joint tenants in fee, but contributed *unequally* towards the purchase, after which some of them died. They were held to be tenants in common in equity; and though one of the five had deserted the partnership for thirty years, yet he was let in afterwards on terms.

1. It is an invariable rule at law that when purchasers take a conveyance to themselves and their heirs, they will be joint tenants, and upon the death of one of them the estate will go to the survivor. The judgment of Sir J. Jekyll in the above case, expresses as clearly as possible how equity regards and treats this rule. "*Equity follows the law,*" except where circumstances exist which give rise to the presumption that the parties did not intend the rule of law to apply (*z*). This case shows that an unequal advance of the purchase-money is regarded in equity as

General rule
at law.

How viewed
in equity.

(*x*) *Lloyd v. Pughe*, 8 Ch. 88.

(*z*) *Rigden v. Vallier*, 3 Atk. 735;

(*y*) *Marshall v. Crutwell*, 20 Eq.

2 Ves. sr. 258; *Aveling v. Knipe*,
19 Ves. 441.

328.

Leaning
against joint
tenancy.

such a circumstance. In applying the rule thus stated, it must be remembered that in equity there is a strong leaning against joint tenancy; and it readily seizes on any circumstance from which it can be reasonably implied that a tenancy in common was intended, so that it may hold the survivors of joint purchasers trustees of the legal estate for the representatives of the deceased purchaser.

Unequal
advance of
purchase-
money.

Sir J. Jekyll qualified the general rule which he laid down by requiring, in order to justify the interference of equity with the rule of law, not only an unequal advance of purchase-money, but also that this should appear from the deed itself. Lord Hardwicke, however, lays down the same rule without this qualification (a).

Joint mort-
gages.

2. Other circumstances than unequal advances may suffice to raise the presumption that tenancy in common was intended. Perhaps the most important class of such cases are those which arise in what are at law joint mortgages. At law the debt and security belong to the survivor. In equity, *whether the money is advanced equally or unequally, mortgagees are deemed to be tenants in common, and the survivor is held to be a trustee for the personal representatives of the deceased mortgagee (b)*. And if joint mortgagees purchase or foreclose the equity of redemption, they will still be held in equity tenants in common, on the ground of presumed intention (c).

In *Robinson v. Preston (d)* a similar intention was presumed in the case of a purchase of stock and the opening of a bank account in their joint names by two sisters who resided together. The moneys so dealt with arose from rents of land of which they were tenants in common. On this ground, strengthened by the facts that other moneys similarly arising were invested on mortgage, the deed of which contained a declaration against joint tenancy, and further that the survivor (against whom, of course, her

(a) *Rigden v. Vallier*, 3 Atk. 735;
Harrison v. Barton, 1 J. & H. 287,
293.

(b) *Morley v. Bird*, 3 Ves. 631.
(c) *Rigden v. Vallier*, *sup.*
(d) 4 K. & J. 505.

own declaration might be read), by her will, executed in the lifetime of the deceased, spoke of "her share" of the property in question, and affected to dispose of it in favour of her sister, Lord Hatherley declared that the sisters were tenants in common in equity of the stock and bank balance. It should be mentioned, however, that in a somewhat similar, though distinguishable case, Lord Romilly came to a different conclusion (*e*).

It seems that parol evidence of *subsequent dealings*, as well as of surrounding circumstances, is, on a purchase by two persons contributing equally, admissible to prove an intention to hold in severalty; but that such evidence as to *statements of intention* is not admissible (*f*).

Parol evidence admissible to show intention to hold severally.

3. The principle of resulting trusts is similarly applied to joint purchases made in the way of trade, or in partnership or other commercial transactions. Its operation in such cases will be considered in detail under the head of Partnership (*infra*, p. 572).

(*e*) *Bone v. Pollard*, 24 Beav. 283. *sup.*, and *Devo v. D.*, 3 Sm. & G. 403.
 (*f*) Compare *Harrison v. Barton*,

SECTION IV.—CONSTRUCTIVE TRUSTS.

- I. *Definition.*
 - II. *Renewal of Leases by Trustees.*
Keech v. Sandford.
 - III. *Purchase of Trust Property by Trustees.*
Fox v. Mackreth.
-

I. *Definition and Description.*

Definition.

When on the grounds of justice and good conscience, without reference to the intention of the parties, equity considers the holder of the legal estate to be not entitled to enjoy the equitable or beneficial interest, it treats him as a trustee. Trusts thus created are called Constructive Trusts.

Trustees, &c.,
gaining advantage from
their trust.

The usual circumstances from which these trusts proceed are where a trustee or any person clothed with a fiduciary character seeks to gain some personal advantage by availing himself of his position as a trustee. As soon as such an advantage is acquired through the medium of a trust, the trustee, however good a legal title he may have, will be decreed in equity to hold for the benefit of the *cestui que trust*.

The principle of constructive trusts enters into so many departments of equity, that it is desirable under this especial heading to deal only with some of the leading and most characteristic illustrations of it. In other parts of the work, for instance in considering the remuneration of trustees, and in the chapter on fraud, it will be necessary again to refer to the principle, and further illustrations thereof will be afforded.

The trusts by which effect is given to the liens of vendors and purchasers, though frequently classed as constructive trusts, are of a distinct nature. From their intimate relation to mortgages, we have preferred to deal with them in connexion with that branch of the subject. (See *infra*, p. 299.)

II. *Renewal of Leases by Trustees.*

Of constructive trusts, one extensive class arises from renewals of leases by trustees and other persons clothed with a fiduciary character, in their own names. The leading authority among cases of this description is Renewal of leases by trustees, &c.

KEECH v. SANDFORD

[Sel. Ca. in Ch. 61; 1 W. & T. L. C. 46];

also commonly known as the *Rumford Market Case*.

In this case a person being possessed of a lease of the profits of a market devised his estate to a trustee in trust for an infant. Before the expiration of the term the trustee applied to the lessor for a renewal for the benefit of the infant. This was refused on the ground that, it being only the profits of a market, there could be no distress, and must rest simply in covenant, which the infant could not make. There was clear proof of the refusal to renew the lease for the benefit of the infant. On this refusal the trustee got a lease made to himself. A bill was brought by the infant to have the lease assigned to him, and for an account of the profits. The plaintiff relied on the principle that wherever a lease is renewed by a trustee or executor it shall be for the benefit of the *cestui que use*. The defendant admitted the principle, but denied that it was applicable to this case, because of the proof of an express refusal to renew to the infant. Lord Chancellor King said: "I must consider this as a trust for the infant; for I very well see, if

“ a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to a *cestui que use*. Though I do not say there is fraud in this case, yet the trustee should rather have let it run out than have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease ; but it is very proper that the rule should be strictly pursued, and not in the least relaxed ; for it is very obvious what would be the consequences of letting the trustees have the lease on a refusal to renew to the *cestui que use*.”

So it was decreed that the lease should be assigned to the infant, and that the trustee should be indemnified from any covenants comprised in the lease, and on account of the profits made since the renewal.

The rule laid down by Lord King has been invariably followed ; the ground of the decisions being the public policy of preventing persons in such situations from acting so as to take a benefit to themselves (*g*).

To whom this doctrine extends.

1. As to the persons to whom the doctrine extends.

This doctrine of constructive trusts extends to the general inclusion of all persons standing in a fiduciary relation with respect to the property affected.

Trustees, executors, and administrators.

(1.) The leading case is sufficient authority for its application to express trustees. An executor stands in precisely the same position (*h*). Similarly, an administratrix of a deceased yearly tenant, who obtained a new tenancy from year to year, was held to be trustee thereof for the next of kin of the intestate, though there was no suspicion of fraud (*i*).

Tenants for life.

(2.) Another class, which is the subject of a great number and variety of decisions, is that of tenants for life, or others having a limited interest in renewable leaseholds, who renew the leases in their own names. In these cases

(*g*) *Griffin v. G.*, 1 S. & L. 354.

(*h*) *Pillgrem v. P.*, 18 Ch. D. 93.

(*i*) *Kelly v. K.*, 8 I. R. Eq. 403.

they will be held trustees for those entitled in remainder to the old lease (*k*). Thus, in *James v. Dean* (*l*), a testator bequeathed leaseholds for years determinable upon lives to his widow (who was his executrix and residuary legatee) for life, with remainder over; the term expired during the testator's life, but he continued to hold as tenant from year to year: the widow obtained a new lease to herself, but it was held to be subject to the trusts of the will, as the residue of the term at the testator's death, however short, would have been. But if the testator had been only a tenant at will, or on sufferance, the case would have been different. Then the tenancy would have been determined by the death of the testator, and thus no interest would have passed by the will to the persons designated to take in remainder, and therefore they could not set themselves up as *cestui que trusts* against the tenant who availed herself of her position to get a renewal in her own name. But Lord Eldon (*m*) was inclined to think that had not the tenant for life in that case been residuary legatee, she would have been held a trustee for the residuary legatee, considering it impossible that the executrix (the life tenant) could hold for herself after availing herself of the position which she held for the benefit of the whole estate for the purpose of procuring the renewal. A renewal, then, under such circumstances, would have the effect of creating an accretion to the general estate (*n*).

Not to a
tenant at will.

Although the tenant for life under a settlement be the settlor himself, if he renew in his own name he will be a trustee for the parties interested under the settlement (*o*). The rule is the same if the tenant for life buys the fee simple reversion on a renewable lease (*p*).

(*k*) *Rawe v. Chichester*, Amb. 715.

(*l*) 11 Ves. 383; 15 Ves. 236.

(*m*) 11 Ves. 393.

(*n*) Lewin on Trusts, 8th ed., p. 182; *Turner v. T.*, 14 Ch. D. 829.

(*o*) *Pickering v. Voules*, 1 Bro. C. C. 197.

(*p*) *Phillips v. P.*, 29 Ch. D. 673; *Re Lord Ranelagh's Will*, 26 ib. 590; and see *Isaac v. Wall*, 6 ib. 706.

Tenant for life receiving payment for not opposing bill in Parliament

Similar in principle to these cases is that in which a tenant for life receives a sum of money for withdrawing his opposition to a bill in Parliament, and the Act then passes authorising the taking of the land in settlement. Whether, then, the land is taken or not, and whether the Act is proceeded upon or not, the money so received must be held for the benefit of all parties interested (*s*).

obtaining a parliamentary title.

In *Cooper v. Phibbs* (*t*), Cooper, being in possession of certain estates and a fishery, which he had covenanted to settle, after previous limitations to himself and his issue male, on his brother for life, with remainder to his issue male, procured an Act of Parliament, which, after reciting that the estates and fishery had descended to and were vested in Cooper, and that the said Cooper was desirous of constructing canals, &c., at his own expense, in consideration of the exclusive right of fishery being vested in him, his heirs and assigns, enacted that the said powers to make canals and cuts should be granted to him, provided that the cuts should be altogether situated on the estates and property of the said Cooper. In all the provisions of the Act, Cooper was spoken of as the owner of the estate. Cooper having died without issue male, the House of Lords held that under the Act of Parliament Cooper took the fishery, bound by the trusts of the settlement, Lord Westbury remarking, with characteristic irony: "I must of necessity assume that Cooper had the intention of stating the truth and the fact to the Legislature . . . therefore you cannot impute to him that he intended to conceal the trusts of the settlement. Then if he stood before Parliament as a trustee, the powers conferred are conferred upon him in his character as trustee, and would be subject to the trusts which affected the donee of those powers" (*u*).

In accordance with the principle in view the Settled

(*s*) *Pole v. P.*, 2 D. & Sm. 420; and see 8 & 9 Vict. c. 18, s. 73.

(*t*) 2 L. R. H. L. 149.

(*u*) See also *Yem v. Edwards*, 3 K. & J. 564; 1 De G. & J. 598.

Land Act, 1882, provides that a tenant for life shall, in exercising any power under the Act, have regard to the interests of all parties, and be deemed to be in the position and to have the duties and liabilities of a trustee for those parties (*x*).

(3.) Joint tenants are subject to a similar equity. If Joint tenants.
one of several persons jointly interested in a lease renews it in his own name, he will hold it in trust for the others according to their respective shares (*y*). Where a tenant for life, and a remainderman of a lease for lives, took a renewal thereof to themselves as joint tenants, in the absence of anything showing a contrary intention, equity regarded their prior interests as remaining unaltered (*z*). If a person jointly interested with an infant renew, and the renewed lease turn out to be not beneficial, the person renewing must sustain the loss; while if it prove beneficial the infant can claim his share of the benefit, provided that he contribute his due proportion to any sums which may have been paid for the renewal (*a*).

(4.) So, likewise, if a partner renew a lease of the part- Partners.
nership premises in his own name, he will, as a general rule, be held a trustee of it for the firm (*b*). But this rule has been departed from in certain cases where the business of the partnership in question has been of a speculative nature, such as a mining concern. In such circumstances, when a surviving partner has renewed a lease in his own sole name, and carried on the business with his own capital, the Court has refused to assist the representative of the deceased partner unless he has come forward promptly, and is ready to contribute a due proportion of money for the purpose of the business; since it would be clearly unjust to let the executor of the deceased partner remain passive while the survivor is incurring all the risk of loss,

(*x*) 45 & 46 Vict. c. 38, s. 53.
(*y*) *Palmer v. Young*, 1 Vern.
276.

(*z*) *Hill v. H.*, 8 I. R. Eq. 140.

(*a*) *Exp. Grace*, 1 B. & P. 376.
(*b*) *Featherstonehaugh v. Fenwick*,
17 Ves. 298, 311; *Olegg v. Fishwick*,
1 Mac. & G. 294.

and only claim to participate after the affairs have proved to be prosperous (*c*). Such a case conspicuously requires the application of the maxims "*Vigilantibus non dormientibus æquitas subvenit*," and "he who seeks equity must do equity." In order, however, to gain the benefit of this exception, the surviving partner must make full disclosure as to the state of the concern, such as will enable the representative to exercise a sound discretion as to the course he ought to pursue (*d*).

Agents. Similarly, a person acting as agent, or in any similar capacity for a person having an interest in a lease, cannot renew for his own benefit (*e*).

Mortgagee. (5.) If a mortgagee renew a lease of the mortgage premises, the renewal, whether before or after the expiration of the lease, shall be for the benefit of the mortgagor, on condition of his paying the mortgagee his charges (*f*).

Mortgagor. *Vice versâ*, if the mortgagor obtains a new lease or the reversion of the mortgaged property, the new lease or reversion will be held a graft on the old one, for the benefit of the mortgagee (*g*). On the same principle, if a person entitled to a lease which is subject to debts, legacies, or annuities, renews either in his own name, or in that of a trustee, the incumbrances will remain a charge on the renewed lease (*h*).

Volunteers claiming through trustees, &c. (6.) The same remedies which may be had against trustees, executors, and persons with limited interests, renewing leases in their own names, may also be had against volunteers claiming through them, and against purchasers from them with notice, express or implied (*i*).

2. The extent and incidents of the doctrine.

These have to some degree been inevitably indicated in

(*c*) *Clements v. Hall*, 2 De G. & J. 173.

(*d*) *Ibid.*, 188.

(*e*) *Griffin v. G.*, 1 S. & L. 353; *Edwards v. Lewis*, 3 Atk. 538.

(*f*) *Rushworth's Case*, Freem. 12; *Rakestraw v. Brewer*, 2 P. Wms. 511.

(*g*) *Smith v. Chichester*, 2 Dr. & W. 393; *Hughes v. Howard*, 25 Beav. 575; *Leigh v. Burnett*, 29 Ch. D. 231.

(*h*) *Seaborne v. Powel*, 2 Vern. 11.

(*i*) *Bowles v. Stewart*, 1 S. & L. 209; *Walley v. W.*, 1 Vern. 484; *Pillgrem v. P.*, 18 Ch. D. 93.

reciting the cases which show to whom the doctrine applies. But there remains some further comments necessary to a full exposition of the matter.

(1.) Though a person in the fiduciary positions described is termed a trustee, he is not in all respects treated like a trustee who is such by virtue of an express trust. The Statute of Limitations will, for instance, run in his favour, against persons claiming the benefit of the constructive trust (*k*). And the *cestui que trust* may, apart from the statute, be bound by acquiescence and lapse of time; especially, as we have seen in respect of partnership cases, where the property sought to be affected with the trust is subject to extraordinary contingencies, or is capable of being rendered productive only by a large and hazardous outlay (*l*).

Constructive trustee not treated as an express trustee.

Time runs in his favour.

(2.) The remaindermen and others who seek the benefit of a constructive trust, are required to indemnify the trustee against any covenants he may have entered into with the lessor (*m*). Moreover the trustee will have a lien upon the estate for the costs and expenses of renewing the lease, with interest (*n*), and for the costs of *lasting improvements* (*o*), though not for alterations adopted as a matter of taste or personal convenience (*p*).

Entitled to indemnity,

and lien for outlay on improvements and costs.

In the case of *Dent v. D.* (*q*), the erecting of a conservatory, the re-building of farm-houses, the erecting of cottages and permanent furnaces, works and buildings, and the draining of marshy ground, were held to be not such permanent improvements as to entitle the tenant to a lien on the estate for money so laid out; but an inquiry was directed in the same case as to whether the laying out of money in completing the mansion-house, and in working a foreign mine so as to prevent forfeiture was or was

What are improvements.

(*k*) *In re Dane's Estate*, 5 I. R. Eq. 498; *Knox v. Gye*, 5 L. R. H. L. 656, 675; *Met. Bank v. Heiron*, 5 Ex. D. 319; *Banner v. Berridge*, 18 Ch. D. 254.

(*l*) *Clegg v. Edmondson*, 8 De G. M. & G. 787; *Erlanger v. New Som-*

brero, &c. Co., 3 App. C. 1218.

(*m*) *Giddings v. G.*, 3 Russ. 241.

(*n*) *Rawe v. Chichester*, Amb. 715.

(*o*) *Holt v. H.*, 1 Ch. Ca. 190;

Walley v. W., *sup.*

(*p*) *Mill v. Hill*, 3 H. L. 828, 869.

(*q*) 30 Beav. 363.

not for the benefit of the inheritance. But each case must be considered on its own merits in determining the question thus raised; everything may depend on the *bona fides* of the tenant for life, and the particular relation of the alleged improvements to the estate concerned. Under such circumstances there is nothing surprising in a great appearance of conflict in the decisions (*r*).

With the view of avoiding the difficulties and hardship of such cases, various statutes have been passed following in the train of the Improvement of Land Act, 1864 (*s*), affording facilities for the improvement of settled land by means of moneys borrowed from government, and re-payable by instalments charged on the land improved.

Per contra is chargeable for waste, rents and profits.

On the other hand, charges in the nature of waste and for deterioration must be set off against anything thus found for improvements (*t*); the trustee must account for the mesne rents and profits (*u*), such account in the case of a tenant for life of course commencing only from his decease (*x*), and must assign the lease free from incumbrances.

Court is vigilant to prevent evasion.

(3.) The Court is vigilant to prevent any fraudulent evasion of the doctrine of constructive trusts. The case of *Cooper v. Phibbs* above commented on is a good illustration of this. Where, therefore, a lessee by collusion with his landlord incurred a forfeiture of his lease, and then obtained a new lease, the trusts of the former were held to attach to the latter (*y*). So if a person who has a right of renewal sells such right, the money produced by the sale will be subject to the same trusts as the leaseholds if renewed would have been (*z*).

(*r*) See *Re Leslie's Settled Trusts*, 2 Ch. D. 185; *Re Leigh's Estate*, 6 Ch. 887; *Re Aldred's Estate*, 21 Ch. D. 228.

(*s*) 27 & 28 Vict. c. 114; and see the provisions of the Settled Land Act, 1882, as to the laying out of capital moneys under the Act in improvements, 45 & 46 Vict. c. 38,

ss. 21, 25.

(*t*) *Mill v. Hill*, 3 H. L. 828, 869.

(*u*) *Mulvany v. Dillon*, 1 Ball & B. 409.

(*x*) *Giddings v. G.*, 3 Russ. 241.

(*y*) *Hughes v. Howard*, 25 Beav. 575.

(*z*) *Owen v. Williams*, Amb. 734.

(4.) Where renewable leaseholds are taken by a railway or other company under compulsory powers, a tenant for life will only be entitled to the interest arising from the purchase-money, although the custom to renew may not have ceased until after the premises were thus taken; at any rate, when the primary intention of the settlor appears to have been to create a perpetual estate (a).

Cases of compulsory purchases.

(5.) When it is impossible to obtain the renewal of a lease, if there be no predominant trust for renewal overriding the disposition in favour of the subsequent tenant for life, the latter will, it seems, be entitled to the sum accumulated by the direction of the settlor for that purpose (b). But where it appears to have been the paramount intention of the testator that those entitled in reversion expectant upon the decease of a tenant for life should succeed to the enjoyment of substantially the same estate, the tenant for life, upon the renewal becoming impracticable, will only be entitled to the income of the sum set apart for renewal and of the sum produced by the sale of the leaseholds (c).

Renewal impossible; accumulated sums.

And where a trustee, or person in a fiduciary position, who has acquired the legal possession of and dominion over an estate, subject to a covenant for perpetual renewal, so deals with the property as to make the renewal impossible, by his own act, and with a view to his own benefit, he is bound to give full effect to the charges on the trust estate, and to satisfy those charges out of the acquired estate, so far as may be necessary (d).

(a) *Re Wood's Estate*, 10 Eq. 572.

(b) *Morres v. Hodges*, 27 Beav. 625; *In re Money's Trusts*, 2 D. & Sm. 94.

(c) *Maddy v. Hale*, 3 Ch. D. 327; *Re Barber's Settled Estate*, 18 ib. 624.

(d) *Trumper v. T.*, 14 Eq. 295, 310; 8 Ch. 870.

III. *Constructive Trusts arising from a Purchase of Trust Property by a Trustee.*

Purchase of
trust property
by a trustee.

This class of trusts is usually illustrated by reference to the important case of

FOX v. MACKRETH,

PITT v. MACKRETH,

[2 Bro. C. C. 400; 2 Cox, 320; 1 W. & T. L. C. 123]

in which a mortgagee who purchased the mortgaged property himself by taking an undue advantage of the confidence reposed in him, and sold it at a higher price, was decreed to be a trustee for the mortgagor of the sum produced by this sale.

Statement of
the principle.

This case is usually referred to as having established the rule, ever since recognised and acted upon by Courts of Equity, that a purchase by a trustee for sale from his *cestui que trust*, although he may have given an adequate price, and gained no advantage, shall be set aside at the option of the *cestui que trust*, unless the connexion between them most satisfactorily appears to have been dissolved, and unless all knowledge of the value of the property acquired by the trustee has been communicated to his *cestui que trust*. The principle of the rule is, however, more clearly expressed by Lord Eldon in *ex parte Lacey* (e). He says: "It is founded upon this: that "though you may see in a particular case that the trustee "has not made advantage, it is utterly impossible to "examine upon satisfactory evidence, in ninety-nine cases "out of a hundred, whether he has made advantage or not. "Suppose a trustee buys any estate, and by the knowledge "acquired in that character discovers a valuable coal mine "under it, and, locking that up in his own breast, enters "into a contract with his *cestui que trust*, if he chooses to

(e) 6 Ves. 625, 627.

“deny it, how can the Court try that against his denial? “The probability is that a trustee who has once conceived “such a purpose will never disclose it, and the *cestui que* “*trust* will be effectually defrauded.” The decision, then, in the principal case, depended not on whether the defendant purchased at an under value, but on the fact that he purchased it from his *cestui que trust* while that relation continued to subsist and without a full disclosure. There are indeed many passages in Lord Thurlow’s judgment which seem to point to the other as the ground of his decision, but as to these he subsequently admitted himself to have been mistaken, and declared the latter to be the true principle. Upon this principle the value was immaterial; for if the original transaction was right, it was of no consequence at what price Mackreth sold the estate afterwards; if it was wrong, Mackreth, not having discharged himself from the character of trustee, if an advantage was gained by the most fortuitous circumstance, still it was gained for the benefit of the *cestui que trust*, not of the trustee (*f*). We proceed to consider the application of the principle under the varying circumstances which have occurred in practice.

Value given immaterial.

This inquiry conveniently resolves itself into two divisions. First, What are the limits of the application of the principle? Or, in other words, Is bargaining between a trustee and a *cestui que trust* ever supportable in equity, and if so, when? Secondly, What persons come so far within the definition of a trustee as to be affected by the principle which forbids such transactions? Subsidiary to these questions, it will be advisable to consider the nature of the relief afforded by equity in such cases.

1. The limits of the application of the principle.

(1.) The cases already referred to are sufficient authority for the proposition that a trustee cannot by a direct

Limits of the principle.
Direct private contract.

(*f*) See Lord Eldon’s judgment above quoted, and *Exp. Bennett*, 10 Ves. 381, 394.

and private contract with his *cestui que trust* become a purchaser of the trust estate. The rule is the same as to both real and personal estate, and, as has been seen, the question is not one of price (though naturally, if an adequate price was given, it would not probably be challenged), but of the position of the parties. Similarly, a trustee can no more take a lease than he can purchase from himself (*g*).

Purchase at auction.

(2.) A purchase by trustees at a public auction will not be sustained; for if persons in such a capacity were present at an auction as bidders, their mere presence would operate as a discouragement to others. The knowledge that certain persons who naturally have superior means of information are bidding must inevitably check competition (*h*).

Purchase through or as an agent,

(3.) Nor is it admissible for a trustee to purchase through an agent, even at an auction (*i*). On the other hand, he is equally disqualified from purchasing as an agent for another person (*k*). A purchase from co-trustees is equally objectionable (*l*).

or from co-trustees.

Retiring from trust on purpose.

(4.) Nor can a trustee be allowed to purchase the trust property, by retiring from the trust with that object in view (*m*).

Purchase under a decree.

(5.) Similarly, it has been held that a trustee cannot purchase before the Master under a decree for sale (*n*).

From trustee in bankruptcy.

(6.) And that he cannot purchase from the trustee in bankruptcy of his *cestui que trust*, under an agreement to divide the profits, more especially if the purchase-money consists of part of the trust funds (*o*).

Fair sale and re-purchase.

(7.) On the contrary, where a trustee has fairly sold an

(*g*) *Att.-Gen. v. E. of Clarendon*, 17 Ves. 491, 500; *Passingham v. Sherborne*, 9 Beav. 424.

(*h*) *Exp. Lacey*, 6 Ves. 629; *Exp. James*, 8 Ves. 348.

(*i*) *Campbell v. Walker*, 5 Ves. 678; 13 Ves. 601; *Ingle v. Richards*, 28 Beav. 361.

(*k*) *Exp. Bennett*, 10 Ves. 381, 400; *Gregory v. G.*, Coop. 204.

(*l*) *Whitchcote v. Lawrence*, 3 Ves. 740.

(*m*) *Spring v. Pride*, 4 De G. J. & S. 395.

(*n*) *Cary v. C.*, 2 S. & L. 173.

(*o*) *Taughan v. Noble*, 30 Beav. 34.

estate, a subsequent *bonâ fide* purchase of the estate from the purchaser is unobjectionable (*p*).

(8.) And though a trustee cannot purchase from himself, he can purchase from a *cestui que trust* who is *sui juris* and has discharged him from the obligation which attached upon him as trustee (*q*); but such a transaction is subjected to jealous scrutiny, and must be free from all suspicion of fraud, concealment, or undue advantage on the part of the trustee (*r*). A solicitor of a *cestui que trust* has, in general, no authority to consent to a purchase by a trustee (*s*); but a purchase has been allowed in a friendly suit by the trustees of a settlement from a surviving trustee who was a solicitor, and who acted in conduct of the purchase (*t*).

Trust determined and *cestui que trust sui juris*.

(9.) A trustee for infants, moreover, or persons under disability, may sometimes purchase the trust estate, by leave of the Court. Such *cestui que trusts* not being *sui juris* could not enter into any contract by which to release him from the character of trustee; but where an action has been commenced, and the Court has fully examined the circumstances of the case, and a trustee, saying so much is bid, offers to give more, permission may be given to the purchase (*u*).

Purchase with leave of Court.

Leave when given.

(10.) The existence of the relation of trustee and *cestui que trust* does not affect any dealing between the parties as to property entirely unconnected with the subject of the trust (*x*).

Property unconnected with the trust.

(11.) A *cestui que trust* who wishes to set aside a sale, must apply within a reasonable time, which depends upon the circumstances of each particular case (*y*). He may lose his right to impugn the transaction by long acquiescence (*z*), such acquiescence being taken as evidence that

Acquiescence of *cestui que trust*.

(*p*) *Baker v. Peek*, 9 W. R. 472; *ib.* 186; *Dover v. Buck*, 5 Giff. 57.

(*q*) *Coles v. Trecothick*, 9 Ves. 234; *Exp. Lacey*, *sup.*

(*r*) See *Morse v. Royal*, 12 Ves. 355; *Franks v. Bollans*, 3 Ch. 717.

(*s*) *Downes v. Grazebrook*, 3 Mer. 209.

(*t*) *Hickley v. H.*, 2 Ch. D. 190.

(*u*) *Campbell v. Walker*, 5 Ves. 678, 682; 13 Ves. 601; *Farmer v. Dean*, 32 Beav. 327.

(*x*) *Knight v. Marjoribanks*, 2 Mac. & G. 10.

(*y*) *Campbell v. Walker*, *sup.*

(*z*) *Morse v. Royal*, *sup.*

as between the trustee and *cestui que trust* the relation had been abandoned in the transaction (*a*). And acquiescence may be evidenced by other circumstances than mere lapse of time (*b*).

Conditions of. In order, however, to fix acquiescence on a party, it should be unequivocally shown that he knew the fact upon which the supposed acquiescence is founded, and to which it refers (*c*). Time will in general not run against a party so long as his interest is contingent or reversionary (*d*), nor as long as he remains ignorant of his title to relief.

Confirmation. (12.) A *cestui que trust* when *sui juris* may confirm an invalid sale so that it cannot be afterwards set aside (*e*).

Conditions of. But in order to constitute a valid confirmation, a person must be aware that the act he is doing will have the effect of confirming an impeachable transaction (*f*). Nor will the confirmation be valid if done in circumstances of distress or difficulty, or under the force or pressure and influence of the previous transaction (*g*). It must, of course, be an act separate from the impeachable transaction.

2. To what persons the principle applies.

Principle applies to express trustee.

(1.) The strongest case is where the would-be purchaser is an express trustee. In the principal case *Mackreth* was invested with the office directly by means of a trust deed, which created the relation for the express purpose of giving a power of sale; and nothing is more firmly established than that in such and such-like cases a trustee will not be suffered to purchase from himself (*h*).

Not nominal trustee. A mere nominal trustee, however, for instance, one who has disclaimed without ever acting in the trust, or a

(*a*) *Parkes v. White*, 11 Ves. 226; *Seagram v. Knight*, 3 Eq. 398; 2 Ch. 628.

(*b*) *Wright v. Vanderplank*, 2 K. & J. 1.

(*c*) *Randall v. Errington*, 10 Ves. 423, 428.

(*d*) *Gowland v. De Faria*, 17 Ves. 20; *Life Assoc. of Scotland v. Sidal*, 3 De G. F. & J. 58.

(*e*) *Morse v. Palmer*, 12 Ves. 353; *Roche v. O'Brien*, 1 Ba. & Be. 353.

(*f*) *Murray v. Palmer*, 2 S. & L. 486; *Thompson v. Ashbee*, 10 Ch. 15.

(*g*) *Crowe v. Ballard*, 3 Bro. C. C. 117.

(*h*) *Killick v. Flerney*, 4 Bro. C. C. 161.

trustee to preserve contingent remainders, may become a purchaser (i).

(2.) A mortgagee or an annuitant with a power of sale, Mortgagee. being in fact a trustee for sale, cannot, either directly or by his solicitor or agent, purchase the charged estate, except with the express authority of a *cestui que trust* who is *sui juris* (k).

A mortgagee, however, does not ordinarily stand in a fiduciary position towards the mortgagor, so as to render a purchase of the equity of redemption by him from the mortgagor (l), or from a prior mortgagee selling under a power of sale (m), impracticable. Purchase of equity of redemption.

Nevertheless all transactions between a mortgagor and mortgagee are viewed with jealousy, and the sale of an equity of redemption will be set aside where, by the influence of his position the mortgagee has purchased for less than others would have given, or if there are any circumstances of misconduct in obtaining the purchase (n). The same principles apply to the case of the granting of a lease from the mortgagor to the mortgagee (o).

(3.) Executors or administrators will not be permitted, either immediately or by means of a trustee, to purchase for themselves any part of the assets, but will be considered as trustees for the persons interested in the estate, and must account to the utmost extent of the advantage made by them of the subject so purchased (p). Nor can an executor purchase a legacy from a legatee, even though a co-executor (q). So if they compound debts or mortgages, or buy them in for less than is due upon them, they may Executors and administrators.

(i) *Stacey v. Elph*, 1 My. & K. 195; *Parkes v. White*, 11 Ves. 209, 226.

(k) *Downes v. Grazebrook*, 3 Mer. 200; *In re Bloye's Trust*, 1 Mac. & G. 488; 3 H. L. 607, 630; *Martinson v. Clowes*, 21 Ch. D. 857, aff. W. N. 1885, 41.

(l) *Knight v. Marjoribanks*, 2 Mac. & G. 10; *Melbourne Banking Co. v. Brougham*, 7 App. C. 307.

(m) *Shaw v. Bunny*, 33 Beav. 494, 2 De G. J. & S. 468.

(n) *Ford v. Olden*, 3 Eq. 461; *Prees v. Coke*, 6 Ch. 645, 649.

(o) *Ford v. Olden*, *sup.*

(p) *Hall v. Hallett*, 1 Cox, 134; *Wedderburn v. W.*, 4 My. & Cr. 41; distinguish *Clarke v. C.*, 9 App. C. 733.

(q) *In re Biel's Estate*, 16 Eq. 577; *Beningfield v. Baxter*, 11 App. C. 167.

not retain any benefit out of the transaction for themselves (*r*). Upon the same principle a receiver cannot purchase (*s*).

Trustee in
bankruptcy.

(4.) A trustee of a bankrupt cannot purchase his property (*t*). A purchase by a trustee on being found beneficial has, however, been confirmed by the Court (*u*). He cannot, moreover, purchase the debts of the estate, since to do so would put his duty and his interest in conflict (*x*). The rule applies with equal force to a commissioner of bankrupts (*y*).

Execution
creditor may
purchase.

A creditor who has taken out execution is not precluded from becoming a purchaser of the property seized under it (*z*).

Directors and
promoters of
companies.

(5.) There is a very large number of cases based on the trust relationship existing between the directors and shareholders of companies, which comprise a great variety of transactions regarded by the Courts as unwarrantable or suspicious. Thus—

Purchase of
shares from
chairman.

(i.) Such directors cannot purchase shares from the chairman of the company, who is in fact their co-trustee, unless authorised so to do by the deed of settlement or constitution of the company (*a*).

Purchase
from firm
partners of a
director.

(ii.) Nor can a director acting for the company deal with himself or a firm in which he is a partner. If he does so he must account to the company for all the profits of such dealing (*b*).

Qualifying
shares from
intending
vendor.

(iii.) Persons about to become directors of a proposed company will not be allowed to accept money or to purchase shares to qualify them for office, from a person about to become a vendor to the company, and with whom

(*r*) *Exp. James*, 8 Ves. 337, 346.

(*s*) *Alwen v. Bond*, 1 My. & K. 196.

(*t*) *Exp. Lacey*, 6 Ves. 623.

(*u*) *Exp. Gore*, 6 Jur. 11, 18; 7 *ib.* 136.

(*x*) *Pooley v. Quilter*, 2 De G. & J. 327.

(*y*) *Exp. Bennett*, 10 Ves. 381.

(*z*) *Stratford v. Twynam*, Jac. 418. See also *Chambers v. Waters*, 3 Sim. 42.

(*a*) *Hodgkinson v. The National, &c. Co.*, 26 Beav. 473; De G. & J. 422; *Imperial, &c. Assoc. v. Coleman*, 6 Ch. 558; 6 L. R. H. L. 189.

(*b*) *Flanagan v. G. W. R. Co.*, 7 Eq. 116; *Albion, &c. Co. v. Martin*, 1 Ch. D. 580.

it was their duty to deal as trustees for the company; such money if received will be held to belong to the company, and if it has been applied in the purchase of shares, such shares would be considered unpaid for, and the directors liable on the winding up of the company to be put on the list of contributories in respect of them (*c*). Where, however, directors received not money but fully paid-up shares, allotted to the vendor as consideration for the sale, although it was held that they were liable to the company for a breach of trust, they were not placed on the list of contributories in respect of the shares (*d*).

(iv.) Promoters of companies are also within the operation of the principle. The particular aspects of their liability in respect of secret profits and concealed contracts are detailed in the Chapter on Companies, to which the student is referred (*e*).

(6.) An agent appointed to sell, including an auctioneer, cannot as a rule purchase from his principal unless he make it perfectly clear that he furnished his employer with all the knowledge which he himself possessed (*f*). If there be any suspicious dealing on the part of an agent, such as his purchasing in the name of a third person, the transaction will not be allowed to stand, however fair it may be in other respects (*g*). Agents for sale.

So also an agent for sale who takes an interest in a purchase negotiated by himself, is bound to disclose to his principal the precise nature of his interest, and the burden of proving such full disclosure is on the agent (*h*).

When, however, the contract for sale has been completed and the agency determined, there is nothing then to prevent his repurchase of the property (*i*), provided there be

(*c*) *In re Canadian, &c. Co., Hay's Case*, 10 Ch. 593; *McKay's Case*, 2 Ch. D. 1.

(*d*) *In re Western of Canada, &c. Co.*, 1 Ch. D. 115.

(*e*) *Infra*, p. 588.

(*f*) *Lowther v. L.*, 13 Ves. 95;

Oliver v. Court, 8 Price, 127, 160.

(*g*) *Trevelyan v. Charter*, 9 Beav. 140; 11 Cl. & F. 714; *Lewis v. Hillman*, 3 H. L. 607.

(*h*) *Dunne v. English*, 18 Eq. 524.

(*i*) *Parker v. McKenna*, 10 Ch. 126.

no suspicion of fraud; but as long as the contract remains executory, the agent having power to enforce or rescind it at his pleasure, there can be no such repurchase (*k*).

Agent for
purchase.

If an agent employed to purchase, purchases for himself, he will be held a trustee for his principal (*l*), and he will not be permitted, except with the plain and express consent of his principal, to make any profit by becoming a seller to him (*m*).

The case of a stock-jobber employed to purchase, selling his own stock without his principal's knowledge, is within the principle, and the sale will be set aside (*n*).

Partner.

(7.) Upon the same principle a partner employed to purchase for the firm may not make a profit by purchasing for himself and selling to the firm (*o*). There is no rule, however, which prevents a surviving partner from purchasing the share of a deceased partner from his representatives (*p*).

Solicitors.

(8.) The relation of solicitor and client also gives rise to the application of the doctrine. A solicitor employed to sell cannot purchase from his client without full disclosure (*q*); and on the other hand, if employed to purchase, he is accountable to his client for any benefits which he may have clandestinely derived from the sale (*r*).

A solicitor or other person, who has the conduct of a sale under a decree, is under an absolute incapacity to purchase thereat; and even though he may not actually have the conduct, if he is so far interested as that it is his duty to assist in procuring the best price for the property offered, he ought not to be allowed to purchase for himself (*s*); but the mere fact of his being concerned in the

(*k*) *Parker v. McKenna*, 10 Ch. 126.

(*l*) *Lees v. Nuttall*, 1 R. & M. 53.

(*m*) *Kimber v. Barber*, 8 Ch. 56.

(*n*) *Brookman v. Rothschild*, 3 Sim.

153; *Gillett v. Peppercombe*, 3 Beav. 78.

(*o*) *Bentley v. Craven*, 18 Beav.

75; *Richie v. Couper*, 28 Beav. 344.

(*p*) *Chambers v. Howell*, 11 Beav. 6.

(*q*) *Watt v. Grove*, 2 S. & L. 492.

(*r*) *Bank of London v. Tyrrell*, 27

Beav. 273; 10 H. L. 26; *Harpham*

v. Shacklock, 19 Ch. D. 207.

(*s*) *Sidney v. Ranger*, 12 Sim. 118.

suit is not sufficient to incapacitate him (*t*), particularly if he has leave to bid at the sale (*u*).

A solicitor is not incapable of contracting with his client ; but if such a contract is challenged a solicitor can only support it by clear proof of its fairness and of the absence of any concealment (*x*) ; and it is always preferable for a solicitor contemplating a purchase from his client to insist on the intervention of another legal adviser (*x*).

Not incapable of contracting with client,

but should generally not do so.

And although he may have ceased to act as the client's adviser, he may not use to his advantage the knowledge of the client's affairs acquired during the continuance of the relation, and which is concealed from the client (*z*).

Even after ceasing to act as adviser.

The same rules apply to counsel as to solicitors (*a*), and it matters not that the adviser acted gratuitously (*b*).

Counsel.

Formerly an agreement by a solicitor to receive a fixed sum for costs for business thereafter to be done was not binding on the client, who might in spite of it require a bill of costs and taxation (*c*).

Solicitor's Act, 1870.

Express provision is, however, now made for such contracts, as to contentious business by 33 & 34 Vict. c. 28 (*d*), and as to non-contentious business by 44 & 45 Vict. c. 44 (*e*) ; though contracts made under these Acts are still liable to review by a taxing-master, if shown to be unfair or unreasonable, and must be in writing (*f*).

(9.) An arbitrator is unable to purchase the unascertained claims of any of the parties to the reference (*g*). He has, in fact, a similar position to a judge, who cannot deliver a valid judgment in the subject-matter of which he has an interest.

Arbitrator.

(*t*) *Guest v. Smythe*, 5 Ch. 551.

657.

(*u*) *Boswell v. Coaks*, 23 Ch. D. 302 ; 27 *ib.* 424 ; *Coaks v. Boswell*, 11 App. C. 232.

(*b*) *Hobday v. Peters*, 28 Beav. 149.

(*x*) *Pisani v. Att.-G. for Gibraltar*, 5 P. C. 516.

(*c*) *Re Newman*, 30 Beav. 396.

(*d*) Ss. 4, 7—10.

(*e*) S. 8.

(*z*) *Cane v. Allen*, 2 Dow. 289 ; *Edwards v. Meyrick*, 2 Hare, 69.

(*f*) *Re Russell*, 30 Ch. D. 114.

(*a*) *Carter v. Palmer*, 8 Cl. & F.

(*g*) *Blennerhasset v. Day*, 2 Ba. & Be. 16.

Guardian and ward. (10.) Transactions between a guardian and ward during the existence of the relationship are considered invalid (*h*), and even after the ward has become of age the Court regards such dealings with suspicion (*i*). If, however, full consideration has been paid, they could not be set aside (*k*). Where a guardian bought up incumbrances on the ward's estate at an undervalue he was held trustee for the ward, and was only allowed to charge him what he actually paid (*l*).

Inclosure Commissioners. (11.) Acting on the same principle, the Legislature has rendered commissioners under the General Inclosure Act incapable of purchasing any estate in the parish in which the inclosure is made until five years after the date and execution of the award (*m*). Under the Commons Inclosure Act a similar clause prevents valuers from purchasing land until seven years after the award (*n*).

Governors and trustees of charities. (12.) Governors and trustees of a charity cannot grant a lease to or in trust for one of themselves (*o*), nor insert in a lease any stipulation for their own private advantage (*p*). The same rule applies to a member of a corporation taking a lease of the corporate property (*q*).

It has been held, though difficult to reconcile with principle, that a trustee of a charity can become a mortgagee of the charity property (*r*).

Any relation of confidence. (13.) Where no definite relationship such as those we have considered exists between the parties, yet nevertheless, if there exists a confidence between them of such a character as enables the person in whom such confidence is reposed to exert exceptional influence over the person trusting him, the Court will not allow any transaction

Tate v. Williams.

(*h*) *Powell v. Glover*, 3 P. Wms. 534.
251, n.

(*i*) *Grosvenor v. Sherratt*, 28 Beav. 659.

(*k*) *Hylton v. H.*, 2 Ves. Sr. 549.

(*l*) *Henley v. —*, 2 Ch. Ca. 245.

(*m*) 41 Geo. III. c. 109, s. 2.

(*n*) 8 & 9 Vict. c. 118, s. 219.

(*o*) *Att.-G. v. Dixie*, 13 Ves. 519,

(*p*) *Att.-G. v. Mayor of Stamford*, 2 Swanst. 592; *Att.-G. v. Corp. of Plymouth*, 9 Beav. 67.

(*q*) *Att.-G. v. Corp. of Cashel*, 3 Dr. & W. 294.

(*r*) *Att.-G. v. Hardy*, 1 Sim. N. S. 338. But see *Forbes v. Ross*, 2 Cox, 113.

between them to stand unless there has been full explanation and communication of every particular in the knowledge of the person who seeks to establish the contract (*s*). In the case referred to there was great disparity of age between the parties, and the younger was known to be in pecuniary distress. In the absence of any such relationship and of fraud, mere inadequacy of consideration will not be a sufficient reason for setting aside a sale (*t*), but gross inadequacy of price coupled with want of due protection and advice, precipitation in carrying out the bargain, especially when the vendor is poor and illiterate, has often been considered sufficient evidence of fraud to enable the vendor to set aside a contract (*u*). See Fraud, *infra*, p. 162 *et seq.*

3. The nature of the relief afforded by equity.

Nature of relief.

A *cestui que trust* (under which term are now included all persons who on the above grounds are entitled to set aside a sale) has usually a choice of two courses.

(1.) He may insist on a reconveyance of the property from the trustee who purchased it (if it remains in his hands unsold), or from a person who has purchased it from him with notice of the breach of trust (*x*). Such reconveyance will be decreed on the terms of his repaying the purchase-money with interest at four per cent., and all sums which may have been expended in repairs and improvements of a permanent nature. On the other hand, there will be an allowance made for all acts tending to deteriorate the value of the estate; and the trustee must account for all rents and profits received by him, and pay an occupation rent for such part of the estate as he has retained in his actual possession (*y*). In some cases, however, where sales have been set aside for actual fraud,

Option.

Reconveyance with compensation.

(*s*) *Tate v. Williamson*, 2 Ch. 55.

(*t*) *Harrison v. Guest*, 6 De G. M. & G. 424; 8 H. L. 481.

(*u*) *Longmate v. Ledger*, 2 Giff. 157; *Baker v. Monk*, 33 Beav. 419.

(*x*) *York Buildings Co. v. Mackenzie*, 8 Bro. P. C. 42; *Pearson v. Benson*, 28 Beav. 598.

(*y*) *Hall v. Hallett*, 1 Cox, 134; *Campbell v. Walker*, 5 Ves. 678, 682; *Mill v. Hill*, 3 H. L. 828, 869.

allowance for money laid out in improvements has been refused (*z*).

Resale.

(2.) But if the *cestui que trust* does not wish for a reconveyance, an order will be made that the expense of repairs and improvements, after making allowance for deteriorating acts, shall be added to the purchase-money, and that the estate shall be put up at the accumulated sum. If any one makes an advance upon that sum the trustee shall not have the estate; if not, he will be held to his purchase (*a*).

Account of profits.

(3.) Where the trustee has resold the estate to a purchaser without notice, the *cestui que trust* can, as in the principal case, make him account for his receipts with interest.

Costs.

(4.) The costs of the suit where the sale has been set aside must be paid by the trustee (*b*), unless there has been great delay on the part of the *cestui que trust* (*c*); and where a suit has failed on account of such delay the trustee has been refused his costs (*d*).

(*z*) *Kenney v. Browne*, 3 Ridg. 518.

(*a*) *Exp. Reynolds*, 5 Ves. 707; *Tennant v. Trenchard*, 4 Ch. 537, 546.

(*b*) *Sanderson v. Walker*, 13 Ves. 601.

(*c*) *Att.-G. v. Dudley*, Coop. 146. (*d*) *Gregory v. G.*, Coop. 201.

SECTION V.—DUTIES AND LIABILITIES OF TRUSTEES.

- I. *Getting in trust property, perishable property and reversions.*
Howe v. Lord Dartmouth.
- II. *Custody of trust property.*
Speight v. Gaunt.
- III. *Investment.*
- IV. *Liability of Co-trustees.*
Townley v. Sherborne.
Brice v. Stokes.
- V. *Remedies of a cestui que trust.*
Thorndike v. Hunt.
- VI. *Remuneration of trustees.*

In considering the position of trustees, we will first discuss their duties with respect to the trust property. And this naturally divides itself under three heads: 1st. As to the getting in of outstanding property of the trust. 2ndly. As to the custody of such property. 3rdly. As to its proper investment.

I. *Getting in outstanding Trust Property.*

It is among the most important of the duties of a trustee to take such steps as are necessary for the security of the trust property; and the first of such steps is to get all such property into his hands, or under his control. In other words, all outstanding property must be reduced into possession.

1. (1.) Debts due to the trust must therefore, with all reasonable diligence, be collected. Money may not be left outstanding upon personal security; and this although

Getting in
outstanding
property.

Debts
collected.

the security of the loan giving rise to the debt be one which the creator of the trust considered sufficient (*e*).

Trustee liable
for loss by
neglect.

Trustees, however, will be allowed the exercise of a fair discretion, and are not expected to commence legal proceedings unnecessarily, nor where such proceedings would be useless (*f*), but they will not be justified in granting any great indulgence (*g*). In case a loss to the estate is occasioned by neglect of this duty, a trustee or executor will be personally answerable.

He may
exercise
reasonable
discretion.

(2.) But although a loss may have taken place by non-conversion of the assets by an executor, he will not be liable if the delay was caused by the exercise of a reasonable discretion; and if there be more than one executor, each one is entitled to exercise such discretion without risk, notwithstanding the opposition or difference of opinion of another (*h*).

Releasing and
compounding
debts.

23 & 24 Vict.
c. 145, s. 30.
44 & 45 Vict.
c. 41, s. 37.

(3.) In the exercise of a sound discretion trustees might even before 23 & 24 Vict. c. 145, release or compound a debt (*i*), and by that statute this power was confirmed and extended. Now by 44 & 45 Vict. c. 41, s. 37, executors and trustees are authorised to accept any composition, or any security real or personal, for any debt, or for any property real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's estate or to the trust, and for any of those purposes to enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases and other things as seem expedient, without being responsible for any loss occasioned by anything so done in good faith.

(*e*) *Powell v. Evans*, 5 Ves. 839;
Bullock v. Wheatley, 1 Coll. 130.

(*f*) *Clark v. Holland*, 19 Beav.
271.

(*g*) *Lowson v. Copeland*, 2 Bro. C.
C. 156; *Caffrey v. Darby*, 6 Ves.
488.

(*h*) *Buxton v. B.*, 1 My. & Cr.
80; *Marsden v. Kent*, 5 Ch. D.

598.

(*i*) *Blue v. Marshall*, 3 P. Wms.

381; *Ratcliffe v. Hinch*, 17 Beav.
216.

2. Money employed by a testator in trade may not be suffered to remain so invested by his executors, without express authority (*k*). Reasonable time is of course allowed for the purpose of winding up the concern; and the Court has jurisdiction in an administration suit to direct that a trade or business in which infants are interested shall be continued, and will so direct if it be for their benefit (*l*).

Money employed in trade.

3. Very frequently we find in a will personal property of a perishable nature bequeathed to a person for life with remainder over. In such a case the question arises whether the intention was that the first legatee should enjoy the property specifically, with the possible consequence that by the consumption or falling in of the property the remainderman will receive no benefit at all; or whether, for the equal treatment of both, the property should be sold, and the proceeds laid out on permanent investments. Conversely, reversionary property is sometimes similarly bequeathed, and the question is whether it is to remain in its existing state, with the possible consequence of its not falling into possession during the lifetime of the first tenant, so that though named as a beneficiary he will receive nothing from it, or whether again for the equal treatment of both it should be sold and invested so as to produce an immediate income.

Perishable property with life interests

and reversionary property.

On these questions the case of

General rule requires conversion.

HOWE v. LORD DARTMOUTH

[7 Ves. 137; 2 W. & T. L. C. 296]

is a leading authority. From it we gather that *whenever there is a general bequest of property of a wasting nature, such as long annuities or leaseholds, to persons in succession, the general rule is that it should be forthwith converted, and laid out in permanent securities; and again, that reversionary property, or property the enjoyment of which is not to com-*

(*k*) *Kirkman v. Booth*, 11 Beav. 273.

(*l*) *Perry v. P.*, 3 I. R. Eq. 452.

mence until a future time, or until the happening of a contingency, ought to be similarly converted.

The principle is thus expressed in *Hinres v. H.* (m): "The result of the rule laid down by Lord Eldon in *Howe v. Lord Dartmouth* (n), and by Lord Cottenham in *Pickering v. P.* (o), is that where personal estate is given in terms amounting to a general residuary bequest to be enjoyed by persons in succession, the interpretation which the Court puts upon the bequest is that the persons indicated are to enjoy the same thing in succession; and in order to effectuate that intention, the Court as a general rule converts into permanent investments as much of the personalty as is of a wasting or perishable nature at the death of the testator, and also reversionary interests."

Subject to testator's intention if ascertainable.

This general principle is simple enough: but like all general principles it is subject to the paramount rule that in the construction of wills the testator's intention is, if ascertainable, to prevail. He may of course direct, if he chooses, that his property, however wasting, shall be specifically enjoyed in the first place by a life tenant, and that the remainderman shall take only what chance may leave for him; and difficulties often arise in ascertaining whether such is, or is not, the testator's intention.

What amounts to indication of contrary intention.

This question is one which evidently depends upon the language of each particular instrument, so that no general formula can be laid down for its decision. We can only illustrate from actual cases what has and what has not been considered sufficient to entitle the legatee to enjoyment of perishable property *in specie*, observing, however, that in all cases the burden of proof is upon the person who opposes immediate conversion according to the rule (p).

Absence of direction to convert does not.

The mere absence of a direction to convert the property has never been considered to mean that it should be enjoyed

(m) 3 Ha. 609, 611.

(n) *Supra*.

(o) 4 My. & Cr. 289.

(p) *Macdonald v. Irvine*, 8 Ch. D. 101.

in specie (q). On the other hand, if there is a *specific gift* of such property, then the mere fact that trustees have a discretionary power to sell it is not a reason for converting it. The discretion is deemed to be given only for the security of the property, not with a view to vary or affect the relative rights of the legatees (r). But where there was a direction in a will that trustees should in their sole discretion sell so much and such parts of the residuary estate as they might think necessary, the Court declined to interfere with their discretion so as to prevent a tenant for life enjoying leaseholds *in specie* (s). An express direction for sale at a given period indicates an intention that there should be no previous sale or conversion (t). And where, after giving power to postpone conversion of his property, the testator declared that until sale the net rents, profits and income should be paid to the persons to whom the income would be payable if the sale had not actually been made, the profits of a business were held to be payable to the tenant for life until sale (u).

Court will not interfere with discretion if given.

There has been much discussion as to whether the use of such particular words as "rents" and "dividends," in describing the proceeds of property bequeathed, amounts to a sufficient indication of intention against conversion. The result of the cases seems to be that where there is in a residuary gift a trust to pay "rents" to persons in succession, and the residue *comprises no other property except leaseholds* to which it is applicable, then the leaseholds are to be enjoyed *in specie* (x). But if the residue *comprised freeholds as well as leaseholds*, the word "rents" would be sufficiently accounted for without supposing it to apply to the leaseholds, and its presence would not sufficiently

Use of words "rents" and "dividends."

General rule.

(q) *Johnson v. J.*, 2 Coll. 441;

699.

Morgan v. M., 14 Beav. 72, 83.

(u) *Chancellor v. Brown*, 26 Ch.

(r) *Lord v. Godfrey*, 4 Madd.

D. 42.

455.

(x) *Goodenough v. Tremamondo*, 2

(s) *Re Sewell's Estate*, 11 Eq. 80;

Beav. 512; *Fachell v. Roberts*, 32

Gray v. Siggers, 15 Ch. D. 74.

Beav. 140; *Cafe v. Bent*, 5 Ha. 24,

(t) *Alcock v. Soper*, 2 My. & K.

36.

indicate an intention to avoid the usual rule as to their conversion (*y*).

The word "dividends" has been considered sufficient to entitle a legatee for life to the enjoyment of long annuities *in specie* (*z*). But it would not suffice to qualify an express direction to convert preceding it (*a*).

Power of attorney directed to *cestui que trust*.

A direction that power of attorney should be given to *cestui que trusts* entitled to receive in succession the income of property, may show an intention that they should enjoy it *in specie* (*b*).

Direction to divide after death of tenant for life.

A direction to divide property after the death of the tenant for life has been held to indicate a similar intention (*c*). So an exception from a general direction to convert may show an intention that long annuities are to be enjoyed *in specie* (*d*).

Effect of leaseholds enjoyable *in specie* purchased under compulsory powers.

Where a tenant for life is entitled to the enjoyment of leaseholds *in specie*, and they are taken by a company under compulsory powers, and the purchase-money paid into Court, he is entitled to the same benefit thereout as he would have had from the lease (*e*); the mere interest of the money would not be an adequate compensation (*f*). And where the tenant for life in such case outlives the term for which he was entitled as tenant for life, he will become absolutely entitled to the whole fund (*g*).

Rule where conversion would result in loss.

Where property, the subject-matter of a bequest given to persons in succession, is found by the trustees of a testator to be so laid out as to be secure, and to produce a large annual income, but is not capable of immediate conversion without loss and damage to the estate, there the rule is not to convert the property, but to set a value upon it, and to give the tenant four per cent. on such value;

(*y*) *Pickup v. Atkinson*, 4 Ha. 624.

(*z*) *Aleock v. Sloper*, 2 My. & K. 699.

(*a*) *Bate v. Hooper*, 5 De G. M. & G. 338.

(*b*) *Neville v. Fortescue*, 16 Sim. 333.

(*c*) *Collins v. C.*, 2 My. & K. 703.

(*d*) *Wilday v. Sandys*, 7 Eq. 455.

(*e*) 8 & 9 Vict. c. 18, s. 74.

(*f*) *Jeffreys v. Connor*, 28 Beav. 328.

(*g*) *In re Beaufoys's Estate*, 1 Sm. & G. 20.

the residue of the income must then be invested, and the income of the investment paid to the tenant for life, the *corpus* being secured to the remainderman (*h*). The same case decides also that when, according to the construction of a will, the executors have full power to retain certain securities as long as they think advantageous, or to invest the money of the estate upon similar securities, while any such securities remain a part of the testator's estate, the tenant for life is entitled to the specific income arising therefrom; and also that when trustees do not convert unauthorised securities, the tenant for life will only be entitled to an income from the testator's death equal to the dividends of the consols which would have been produced by a sale and investment in consols at a year from the testator's death, and not, as in *Robinson v. R.* (*i*), to interest at four per cent. on their value.

Where trustees were made liable to a remainderman for having improperly allowed perishable property to remain *in specie*, and to be enjoyed by the tenant for life, they were allowed by means of an inquiry in the same suit to recover back against the estate of the tenant for life the amount overpaid to him (*k*). And where trustees, having a discretion as to the time of conversion, allow reversionary property to remain unsold until it falls into possession, the tenant for life will be entitled to have paid to him in respect of interest out of the property, the amount which he would have received had the trustees sold the property at the end of one year after the testator's death (*l*).

Power of trustees when made liable to recover back from tenant for life.

4. Money invested on good real securities is not required to be called in, unless, of course, it is necessary for the payment of debts (*m*); and in an administration action the Court would not permit a real security to be called in

Money invested on good security to remain so.

(*h*) *Brown v. Gellatly*, 2 Ch. 751; and see, also, *Re Chesterfield's Trusts*, 24 Ch. D. 643.

(*l*) *Wilkinson v. Duncan*, 23 Beav. 469; *Wright v. Lambert*, 6 Ch. D. 649.

(*i*) 1 De G. M. & G. 247.

(*k*) *Hood v. Clapham*, 19 Beav. 90.

(*m*) *Orr v. Newton*, 2 Cox, 276.

Second mort-
gage.

without inquiry as to its expediency (*n*). It has been held that a trustee is not bound to call in a fund invested upon a second mortgage (*o*); but seeing that such a security, however apparently ample, is continually liable to damage from the operation of the doctrines of tacking and consolidation (as to which see *infra*, pp. 271, 280), such investments are manifestly undesirable. If, moreover, a trustee has reason to suppose that any real security is not good, it is his duty to call it in at once (*p*).

Property in
power of
third parties.

5. It is the duty of trustees also to place the trust property beyond the power of any third parties. Thus if the trust fund is an equitable interest of which the legal estate cannot be at present transferred, the trustees must at once give notice of their interest to the person in whom the legal estate is vested, in order to avoid a subsequent purchaser gaining priority by giving the first notice (*q*). Similarly a trustee of a settlement which requires registration is responsible for any loss arising from a neglect to procure registration (*r*).

Consequences
of neglect to
realise gene-
rally.

6. Where executors have neglected to realise outstanding assets, the *prima facie* rule is that they are liable for any loss which arises after the expiration of a year from the testator's death, and executors who have not completed the conversion by that time must be prepared to justify their delay (*s*). The rule, however, is not an absolute one, and if in the circumstances of any case a longer delay seemed reasonable, no liability is incurred thereby (*t*).

Under order
of Court.

When trustees are ordered by the Court to realise securities, and they neglect to do so, they will be liable for any loss sustained by their neglect; such direction overrides their discretion (*u*).

(*n*) *Howe v. Earl of Dartmouth*, 7 Ves. 137, 150.

(*o*) *Robinson v. R.*, 1 De G. M. & G. 252.

(*p*) *Ames v. Parkinson*, 7 Beav. 384.

(*q*) *Jacob v. Lucas*, 1 Beav. 436.

(*r*) *Macnamara v. Carey*, 1 I. R.

Eq. 9. See also *Kingdon v. Castleman*, W. N. 1877, p. 15.

(*s*) *Grayburn v. Clarkson*, 3 Ch. 606; *Sculthorpe v. Tipper*, 13 Eq. 232.

(*t*) *Hughes v. Empson*, 22 Beav. 181.

(*u*) *Davenport v. Stafford*, 14 Beav. 319, 338.

On the other hand, if by the instrument creating the trust trustees are given a special discretion as to whether funds shall be called in or not, this will override the usual operation of the rule; and then, in order to charge them with loss, it will be necessary to establish a clear case of misconduct against them (x).

Where they have special discretionary power.

II. *As to the custody of Trust Property.*

A leading authority on the duties and liabilities of trustees as to the custody of trust property is the recent case of

SPEIGHT v. GAUNT,

[9 App. Cas. 1]

in which the House of Lords held that *though a trustee may not "delegate at his own will and pleasure, the execution of his trust, and the care and custody of the trust moneys, to "strangers," yet "that when, according to the regular and "usual course of business, moneys receivable or payable "ought to pass through the hands of mercantile agents, that "course may properly be followed by trustees, though the "moneys are trust moneys."* (Per the Earl of Selborne, pp. 4, 5.)

In the same case Lord Blackburn said that "as a "general rule a trustee sufficiently discharges his duty if "he takes, in managing trust affairs, all those precautions "which an ordinary prudent man of business would take "in managing similar affairs of his own," with the exception that he "must not choose investments other than "those which the terms of his trust permit."

In the application of the principle thus laid down, the following points may be observed.

General principle.

1. If a loss occurs by unavoidable accident, if, for

Not liable for accident,

(x) *Paddon v. Richardson*, 7 De G. M. & G. 563, 582.

instance, without any fault of the trustees, the trust funds are stolen from them or from anyone to whom it was properly entrusted, they are not liable (*y*).

or ordinary
conduct of
business.

2. Similarly, if in a proper course of business they deposit money in a bank, and the bank fails, they are not liable (*z*). By Lord St. Leonards' Act (*a*), s. 31, it has been enacted that every instrument creating a trust shall be deemed to contain a clause exonerating the trustees from liability for any banker, broker, or other person with whom any trust moneys or securities may be deposited. But neither the statute nor the decisions above quoted diminish the importance of the inquiry, whether there was good reason for allowing the money to remain in the banker's hands. The cases show that it is considered a sufficient reason if it is necessary for the ordinary purposes of the trust that a certain sum should be kept in hand, as for the payment of debts, or current expenses or legacies; or if the money is so deposited pending negotiations for its more secure investment. Such moneys must remain somewhere, and in the usual course of business one would utilise a bank for the purpose. It is also similarly reasonable to allow a deposit on a sale to remain in the hands of an auctioneer (*b*). The effect of the statute, it has been held, is to throw the burden of proof on those who seek to charge the trustee (*c*).

Liable for
risks un-
necessarily
incurred.

If, however, moneys be left unnecessarily in the hands of third parties, as in the hands of a banker or solicitor, more than a year after a testator's death, and after the debts and legacies are paid, and a loss occurs, the trustees or executors are liable (*d*).

(*y*) *Jones v. Lewis*, 2 Ves. sr. 240;
Job v. J., 6 Ch. D. 562.

(*z*) *Exp. Belchier*, Amb. 218;
Johnson v. Newton, 11 Ha. 160;
Fenwicke v. Clarke, 31 L. J. N. S.
Ch. 728.

(*a*) 22 & 23 Vict. c. 35.

(*b*) *Edmonds v. Peake*, 7 Beav.
239.

(*c*) *Re Brier*, 26 Ch. D. 238.

(*d*) *Darke v. Martyn*, 1 Beav.
525; *Castle v. Warland*, 32 Beav.
660.

If money be handed to a solicitor to invest and he misapplies it, the trustees will be liable (*e*); or if, after having sold property, they place the conveyance executed by them in a solicitor's hands and he receives and misapplies the money (*f*). And though, as is seen from the leading case above cited, an agent may in proper circumstances be employed to invest, money should not be deposited with him until the investment is found: to do so would be to lend on personal security. Moreover, agents, such as brokers or valuers, must not be employed out of the ordinary scope of their business (*g*).

3. A trustee who, without entirely parting with control over the trust fund, associates another person with him in its management, and so loses the exclusive power over it, will be liable for any loss which results from such a step (*h*). An illustration of this occurs where a sole trustee invests a fund in the joint names of himself and another, and so deprives himself of an unfettered discretion as to its removal (*i*). Associating with others in control of fund,

4. *A fortiori*, a trust fund should not be left under the entire control of a co-trustee. Thus trust money should, where there is more than one trustee, be invested or deposited in the joint names of all, and payable only to their joint order or cheque (*k*). or leaving it in entire control of co-trustee.

(*e*) *Bostock v. Floyer*, 1 Eq. 26.

(*f*) *Ghost v. Waller*, 9 Beav. 497.

(*g*) *Fry v. Tapson*, 28 Ch. D. 268.

(*h*) *Salway v. S.*, 2 R. & My. 215.

(*i*) *White v. Baugh*, 3 Cl. & F. 44.

(*k*) *Clough v. Bond*, 3 My. & Cr. 490; *Trutch v. Lamprell*, 20 Beav. 116.

III. *As to Investment.*

Not to invest
on personal
security.

1. As we have seen that an executor or trustee may not suffer the trust fund to remain outstanding on personal security, though the credit may have been given by the creator of the trust, so it is clear that he is not justified in lending trust-money on personal security, even to a person to whom the creator of the trust had been accustomed so to lend money (*l*). Neither a joint personal security (*m*) nor a loan on a bond with sureties (*n*) is a proper investment.

Save with
express
authority.

In order to warrant investment on personal security *the express authority of the creator of the trust is necessary* (*o*) ; mere general expressions giving to trustees a discretion are not sufficient (*p*).

Not even then
to one of
themselves.

Authority to
be strictly
complied
with.

Even if trustees are authorised to lend upon personal security they may not lend to one of themselves (*q*), or to a relation for the purpose of accommodating him (*r*). And any terms specified in the authority so to lend must be strictly complied with ; for instance, if the consent of any person is required, or the security of a bond is directed (*s*). The term "personal security" has a wider meaning than the security of personal property. It has been held to include a loan upon mere personal credit (*t*).

"Real securities."
What?

2. Permission to invest in real securities does not authorise the purchase of railway mortgages or debenture stock (*u*). Nor does such permission include the security of a judgment upon lands (*x*), or upon an estate for life (*y*).

(*l*) *Terry v. T.*, Prec. Ch. 273 ;
Darke v. Martyn, 1 Beav. 525.

(*m*) *Holmes v. Dring*, 2 Cox, 1.

(*n*) *Watts v. Girdlestone*, 6 Beav.
188.

(*o*) *Forbes v. Ross*, 2 Bro. C. C.
430 ; *Child v. C.*, 20 Beav. 50.

(*p*) *Pocock v. Reddington*, 5 Ves.
794 ; *Mills v. Osborne*, 7 Sim. 30.

(*q*) *Francis v. F.*, 5 De G. M. &
G. 108.

(*r*) *Langston v. Ollivant*, G. Coop.
33.

(*s*) *Cocker v. Quayle*, 1 Russ. &
My. 535.

(*t*) *Pickard v. Anderson*, 13 Eq.
608.

(*u*) *Mortimore v. M.*, 4 De G.
& J. 472.

(*x*) *Johnston v. Lloyd*, 7 I. Eq.
Rep. 252.

(*y*) *Lander v. Weston*, 3 Drew. 389.

Copyholds would be available (*z*), and now doubtless land held for a long term of years, if free from onerous covenants and at a pepper-corn rent (*a*), but not short leaseholds (*b*).

Where trustees or executors are authorised to advance money upon mortgage, they should only advance two-thirds of the value of property even of a permanent value, as freehold land. A still less proportion should be advanced upon fluctuating property, such as houses and buildings, especially if used in trade (*c*). There is, in fact, no general rule of proportion to be relied on and applied with mathematical strictness (*d*). If they have had the property duly surveyed and valued by a competent person, and then *bonâ fide* and to a reasonable extent advance money thereon, they will not be liable, although eventually less may be realised than the sum advanced (*e*). Evidence of value must, however, be procured from an impartial person (*f*).

Loan on mortgage should only be to value of two-thirds.

For the reasons elsewhere given (*g*) money should not be lent on a second mortgage, unless, at least, the legal estate can be promptly secured (*h*). Nor should money be lent on mortgage to a co-trustee (*i*).

Second mortgages.

Mortgage to co-trustee.

If in consequence of the ignorance or negligence of a solicitor employed by trustees to prepare a mortgage a loss occurs, the trustees must personally make it good (*k*).

Loss by solicitor's negligence.

It is a fallacy to suppose that a trustee is relieved from the careful exercise of a sound discretion by the fact that

Security of funds of incorporated companies.

(*z*) *Wyatt v. Sharratt*, 3 Beav. 498.

(*a*) *Townend v. T.*, 1 Giff. 211; *Jones v. Chennell*, 8 Ch. D. 493, 507; *In re Boyd's Settled Est.*, 14 Ch. D. 626. Now, see 44 & 45 Vict. c. 41, s. 65.

(*b*) *Ibid.*, *Fuller v. Knight*, 6 Beav. 209.

(*c*) *Stickney v. Sewell*, 1 My. & Cr. 8; *Budge v. Gummow*, 7 Ch. 719.

(*d*) *Godfrey v. Faulkner*, 23 Ch. D. 483; *Olive v. Westerman*, 34

Ch. D. 72.

(*e*) *Jones v. Lewis*, 3 De G. & Sm. 471.

(*f*) *Norris v. Wright*, 14 Beav. 291, 301; *Smethurst v. Hastings*, 30 Ch. D. 490.

(*g*) Pp. 114 and 280.

(*h*) *Drosier v. Brereton*, 15 Beav. 221; *Smethurst v. Hastings*, *sup.*

(*i*) *Stickney v. Sewell*, *sup.*; *Macleod v. Annesley*, 10 Beav. 600.

(*k*) *Hopgood v. Parkin*, 11 Eq. 74; *Sutton v. Wilders*, 12 Eq. 373.

the investment clause in the instrument creating the trust may in terms authorise certain indifferent securities, or that where such is the case an improvident investment will be excused on the ground that the trustee has risked funds of his own on similar investments. "The duty of a trustee is not to take such care only as a prudent man would take if he only had himself to consider. The duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide" (*l*).

Statutory
powers of
investment.

3. Previous to certain statutes now to be referred to, a trustee's general power of investment was exceedingly circumscribed. In fact, the tenor of some cases seems such as almost to have confined him to government or bank annuities (*m*). But it is not now necessary to consider restrictions which have long been obsolete.

22 & 23 Vict.
c. 35, s. 32.

(1.) By 22 & 23 Vict. c. 35, s. 32 (Lord St. Leonards' Act), it is enacted that "When any trustee, executor or administrator shall not, by some instrument creating his trust, be expressly forbidden to invest any trust fund on real securities, in any part of the United Kingdom, or on the stock of the Bank of England or Ireland, or on East India stock, it shall be lawful for such trustee, executor or administrator, to invest such trust funds on such securities or stock; and he shall not be liable on that account as for a breach of trust, provided that such investment shall in other respects be reasonable and proper." It having been held that this section did not apply to trustees appointed by instruments executed before the passing of the Act, it has been made retrospective by 23 & 24 Vict. c. 38, s. 12.

G. O.,
Feb. 1st,
1861.

(2.) Again, by a general order, made in pursuance of 23 & 24 Vict. c. 38, s. 10, on February 1st, 1861, "Cash

(*l*) *Per* Lindley, L. J., in *Whiteley v. Learoyd*, 33 Ch. D. 347, 355; 498. (*m*) *Hansom v. Allen*, 2 Dick. affd. 12 App. C. 727.

“under the control of the Court may be invested in Bank “Stock, East India Stock, Exchequer Bills and $2\frac{1}{2}$ per “cent. annuities, and upon mortgage of freehold and “copyhold estates respectively in England and Wales, as “well as in Consolidated, Reduced, and New 3 per cent. “annuities.” And since the making of this general order, trustees, executors, or administrators, having power to invest their trust funds upon Government securities, or upon Parliamentary stocks, funds, or securities, or any of them, may invest such trust funds or any part thereof in any of the stocks, funds, or securities, in or upon which, by such general order, cash under the control of the Court may from time to time be invested (n).

(3.) By 23 & 24 Vict. c. 145, s. 25 (Lord Cranworth’s 23 & 24 Vict. Act), since repealed by the Conveyancing Act, 1881 (o), c. 145, s. 25. further directions as to investments were given.

(4.) Doubts having arisen as to the legal effect and 30 & 31 Vict. signification of the words “East India Stock” in 22 & 23 c. 132, s. 1. Vict. c. 35, s. 32, it was by 30 & 31 Vict. c. 132, s. 1, enacted that the said words should include and express as well the East India Stock which existed previously to the 13th of August, 1859 (the date of the passing of the former Act), as East India Stock charged on the revenues of India, and created under and by virtue of any Act or Acts of Parliament passed on or after the 13th of August, 1859; and that it should be lawful for every trustee, executor, or administrator, to invest any trust fund in his possession or under his control in the stock created by the last-mentioned Act or Acts, to the same extent, and for the same purposes and objects, as he can now invest such trust fund in the East India Stock which existed previously to the 13th of August, 1859. By s. 2 of the same Act it s. 2. is enacted that “it shall be lawful for every trustee, executor or administrator, to invest any trust fund in his “possession or under his control in any securities the

(n) 23 & 24 Vict. c. 38, s. 11.

(o) 44 & 45 Vict. c. 41.

“ interest of which is or shall be guaranteed by Parliament, to the same extent and in the same manner as he may invest such trust funds in such securities as aforesaid.”

27 & 28 Vict.
c. 114, s. 60.

(5.) By the Improvement of Land Act, 1864 (*o*), trustees having a power to lend on real securities are enabled (unless the contrary be provided), at their discretion, to invest their trust funds on charges under the Act or on mortgages thereof. This, however, is not retrospective.

34 Vict. c. 27.

(6.) By the Debenture Stock Act, 1871 (*p*), it is enacted that “ where a power has before the passing of this Act been or shall at any time hereafter be given to trustees (including executors, administrators, and any other persons holding funds in a fiduciary capacity) to invest trust funds in the mortgages or bonds of a railway company, or of any other description of company, such power shall, unless the contrary is expressed in the instrument creating the power, be deemed to include a power to invest such funds in the debenture stock of a railway company, or such other company as aforesaid, and an investment of trust funds in debenture stock may be made accordingly.”

Lastly, by the Settled Land Act, 1882 (*q*), capital money arising under the Act may be invested in Government or other securities on which the trustees of the settlement are, by the settlement or by law, authorised to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock of any railway company in Great Britain or Ireland, incorporated by special Act of Parliament, and having for ten years next before the investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities.

Effect of
the statutes.

These statutes have extended the number of investments which may be utilised by trustees, in their discretion,

(*o*) 27 & 28 Vict. c. 114, s. 60.
(*p*) 34 Vict. c. 27.

(*q*) 45 & 46 Vict. c. 38.

but they do not at all affect the principles by which that discretion must be guided, nor do they at all diminish the discretion or responsibility of trustees (r). Their investments must be such as are equally just to all objects of the trust. They may not show favour to a tenant for life by investing upon securities which command a higher rate of interest, in consequence of their being determinable; nor will the Court, in the absence of special circumstances, authorise a transfer from Consols into another investment producing a larger income, if it may be injurious to those in remainder. The Court will, however, be influenced by facts showing it to be for the interest of children that the income of their parents should be increased (s).

Investments must be just to all the *cestui que trusts*.

For the remedies of a *cestui que trust* against trustees who in respect of investments or otherwise commit a breach of trust, see Sect. V., *infra*, p. 129.

Remedies against trustees.

IV. *Liability of Co-trustees.*

The case of

TOWNLEY v. SHERBORNE

[Bridg. Rep. 35; 2 W. & T. L. C. 870]

has been long referred to as a leading authority on the general liability of a trustee for the acts and defaults of his co-trustee.

BRICE v. STOKES

[11 Ves. 319; 2 W. & T. L. C. 877]

illustrates the particular case of the liability which arises from the joining of trustees in giving receipts.

The former case establishes the general principle *that a trustee is not to be held liable for the acts or defaults of a* General rule against the liability.

(r) *Consterdine v. C.*, 31 Beav. 330, 333.

(s) *Cockburn v. Peel*, 3 De G. F. & J. 170, 174.

co-trustee, in which he himself has not participated. As between co-executors also the same rule applies (t).

Exceptions.

Negligence.

Acquiescence.

There are, however, many circumstances which will take a case out of this general rule. Thus a trustee or executor who, though he has not participated in the act which has resulted in loss to the trust estate, has been guilty of negligence, or has stood by and been cognisant of without interfering with a devastavit or breach of trust committed by his co-trustee or co-executor, will be held responsible for it (*u*). In the latter of these cases, an executor, who took no active part in the trusts, was held liable for permitting his co-executor to retain the testator's moneys in a business in which the testator had been partner with the co-executor. Both had proved the will, and having thus undertaken the duty of properly attending to the trusts were bound to diligence therein. Permitting a co-executor to receive the assets and retain them in his hands without proper investment, will also render an executor liable for any loss thus incurred: proper measures ought to be promptly taken to prevent such a breach of trust (*v*).

Fraud.

Still more certainly if a trustee or executor is guilty of any fraud in the matter of the trust, he will not be able to escape liability by throwing the blame on a colleague in the office (*x*).

Unduly
trusting co-
executors.

Executors being jointly responsible for the management of the funds of their testator, questions as to liability often arise when one pays over to his co-executor, or allows him to receive the whole or part of the assets, so that he acquires an exclusive control over them, and they are afterwards lost through his misconduct. The liability in these cases depends upon circumstances. Generally, if an executor thus puts the funds into the power of his

(t) *Littlehales v. Gascoyne*, 3 Bro. C. C. 73.

(u) *Mucklow v. Fuller*, Jac. 198; *Booth v. B.*, 1 Beav. 125.

(v) *Lincoln v. Wright*, 4 Beav. 427; *Stiles v. Guy*, 1 Mac. & G. 422.

(x) *Butler v. B.*, 5 Ch. D. 554; 7 *ib.* 116; 14 *ib.* 329.

co-executor, and they are lost through his bankruptcy, or are embezzled by him, the former is liable to make good the loss (*y*). And it matters not whether this power is given by an absolute payment to a co-executor, or otherwise, as by joining him in indorsing or drawing negotiable instruments (*z*).

But if, in the usual course of the management of the trust, it is necessary for an executor to pay over some of the assets to his colleague, if, for instance, one of them resides in a neighbourhood where a debt has to be paid, and money is remitted to him for that purpose by the other, the executor so remitting money incurs no liability (*a*). Nor will an executor be liable for payment over of a fund which he had no legal right to retain (*b*).

When a co-executor may be rightly trusted.

A husband is no longer liable for the devastavit committed by his wife as trustee, executrix, or administratrix during the coverture, unless he has acted or intermeddled in the trust or administration (*c*), the remedy of the *cestui que trust* being against her separate estate only. The husband's liability for a devastavit committed by her before marriage, depends on the date of marriage and the provisions of the Acts of 1870 and 1874, as to ante-nuptial debts, which are referred to elsewhere (*d*).

Husband not liable for devastavit.

When a trustee joins with a co-trustee in signing a receipt for trust money, it is necessary in order to estimate the liability thus arising, to inquire into the circumstances of the particular case. Every case will on examination be found to fall under one or other of the following heads.

Trustees joining in receipts.

(1.) If the signature of *all the trustees is formally necessary to the receipt, the signature of a trustee to whose hands the money does not come will not suffice to render him liable*

Where it is formally necessary.

(*y*) *Townsend v. Barber*, 1 Dick. 356; *Langford v. Gascoyne*, 11 Ves. 333.

(*z*) *Hovey v. Blakeman*, 4 Ves. 608; *Saddler v. Hobbs*, 2 Bro. C. C. 114.

(*a*) *Bacon v. B.*, 5 Ves. 331; *Joy v. Campbell*, 1 S. & L. 341.

(*b*) *Davis v. Spurling*, 1 Russ. & My. 64.

(*c*) 45 & 46 Vict. c. 75, s. 25.

(*d*) *Infra*, p. 409.

to account for it (e). It is but reasonable that in a case in which he has no power to refuse to sign, his signature should not, without more, fix him with a liability.

Executors.

And the rule as to executors is the same in similar circumstances. It is true that it is not so often necessary for a co-executor to join in a receipt or discharge for conformity's sake; but where, as in the case of a sale of stock standing in the names of executors, the concurrence of both is necessary, the one to whose hands the funds do not come will not be liable (f).

Burden of proof on a person signing.

But in these cases where the signing is alleged to have been for mere conformity, the burden is on a trustee seeking to clear himself, to prove that his co-trustee's were the actual hands which received the money. The signature thus creates a *prima facie* liability in all cases (g).

Where the transaction is unnecessary.

Where, moreover, the transaction of which the receipt forms part is, as it was in *Brice v. Stokes* (h), wholly unnecessary, and the trustee signing then permits his co-trustee to deal with the moneys contrary to the trust, he will be charged with any loss thus occasioned. The entire transaction being unnecessary, the fact that the mere signature was for conformity is not sufficient to discharge him (i). It is the duty of a trustee to inquire as to the necessity of a transaction respecting the trust money; he may not escape by alleging ignorance of the state of the trust (k).

Trustee must inquire as to the necessity.

And similarly an executor will not be justified in those cases where his formal concurrence is necessary, in joining in a transaction upon the mere representation of his co-executor that it is necessary for the purposes of administration. He must make proper inquiries; if he does not, he will be liable for any misappropriation (l).

(e) *Heaton v. Marriott*, cited Prec. Ch. 173; *Fellows v. Mitchell*, 1 P. Wms. 81.

(f) *Chambers v. Minchin*, 7 Ves. 186, 197.

(g) See *Brice v. Stokes*, 11 Ves. 319; *Fellows v. Mitchell*, sup.

(h) *Sup.* p. 123.

(i) See *Brice v. Stokes*, sup.; *Walker v. Symonds*, 3 Swanst. 1; *Ingle v. Partridge*, 32 Bea. 661.

(k) *Hanbury v. Kirkland*, 3 Sim. 265.

(l) *Shipbrook v. Hinchinbrook*, 11 Ves. 252; 16 Ves. 477.

(2.) Where, on the contrary, a person *joins voluntarily in a receipt*, in which his concurrence is not formally requisite, such interference being unnecessary, *he is to be considered as assuming a power over the fund, and is therefore answerable for the application thereof*, as far as it is connected with the particular transaction in which he joins (*m*).

Voluntary joining in a receipt.

This difference usually distinguishes the case of receipts by executors from that of receipts by trustees. In the case of trustees it is commonly requisite that all should join in order to effect a complete discharge. They are, therefore, usually not liable for moneys not coming to their hands. On the contrary, one executor being generally competent to give a valid receipt, the joining of a co-executor is as a rule unnecessary; and as a rule, therefore, executors who so sign are bound by their signatures.

Distinction between trustees and executors.

But there are exceptions to this. Where the act of signing is merely nugatory and has not the effect of putting the trust funds in the hands of a co-executor, for instance, if he has already previously received the money, such signature will not raise a liability (*n*). This is a very extensive exception, and reduces the rule almost to this, that the question really to be decided is whether the money was ever under the control of both executors (*o*).

Exceptions.

The general conclusion, then, as to the receipts of executors seems to be, that where funds belonging to executors are not under the separate control of each, although one of them joins with his co-executor in any act or receipt which will have the effect of putting the funds into his hands, as the joining is absolutely necessary, and is not therefore evidence that the executor so joining thereby assumes a control over the fund, the principle which governs the case of trustees will be applicable, and he will not be liable, if he has used due caution, for the mis-

General conclusion.

(*m*) See *Brice v. Stokes*, *sup.*; 357.

Leigh v. Barry, 3 Atk. 584.

(*o*) *Joy v. Campbell*, 1 S. & L. 341.

(*n*) *Westley v. Clarke*, 1 Eden,

application of the fund by his co-executor (*p*). Its rules, applicable to executors, apply equally to administrators (*q*).

It is scarcely necessary to say that no rule in favour of the exoneration of an executor has application when a case of wilful default is made out against him. A debt from a co-executor to the trust estate must be recovered just as any other outstanding asset (*r*). His personal security is no more warrantable than that of another. Such cases fall under the principles already enounced as to the custody and investment of trust property.

Indemnity
clauses.

An express clause was formerly usually inserted in trust deeds, providing that one trustee should not be answerable for the receipts, acts, or defaults of his co-trustees. Equity infused such a proviso into every trust deed, whether expressed or not (*s*), and no better right was given by the expression of that which if not expressed was implied (*t*). And now Lord St. Leonards' Act (*u*), s. 31, enacts that every instrument creating a trust shall be deemed to contain the usual indemnity and reimbursement clauses. It is no longer, therefore, necessary to introduce such clauses; though of course it is open to a testator to give a wider right to indemnity than that expressed in the statute, as, for instance, by expressly authorizing each trustee to delegate his duties to another; and full effect would be given to such a clause by the Court (*x*).

22 & 23 Vict.
c. 35, s. 31.

Independently also of any express indemnity, a trustee who accepts office at the request of a *cestui que trust* is entitled to be indemnified by him personally against any loss which may accrue in the proper execution of the trust; for instance, if he is made contributory on the failure of a company in which he rightly holds shares in the character of trustee (*y*).

(*p*) *Hovey v. Blakeman*, 4 Ves. 596, 608.

(*q*) *Willand v. Fenn*, cited *Jacomb v. Harwood*, 2 Ves. 267.

(*r*) *Stiles v. Guy*, 1 Mac. & G. 422.

(*s*) *Dawson v. Clarke*, 18 Ves. 254.

(*t*) *Worrall v. Harford*, 8 Ves. 4, 8; *Rehden v. Wesley*, 29 Beav. 213.

(*u*) 22 & 23 Vict. c. 35.

(*x*) *Wilkins v. Hogg*, 3 Giff. 116; *Pass v. Dundas*, 29 W. R. 332.

(*y*) *Jervis v. Wolferstan*, 18 Eq. 18.

V. *Remedies of a Cestui que Trust.*i. *Following the Trust Estate.*

Thorndike v. Hunt.

ii. *Personal Remedies.*iii. *Removal of Trustees.*

I.—1. One of the most conspicuous and instructive authorities as to the principles on which equity acts in assisting a *cestui que trust* to follow and recover trust property which has been wrongfully disposed of by a trustee, is the case of

Following trust property.

THORNDIKE v. HUNT.

[3 De Gex & Jones, 563.]

In this case a trustee, on being ordered to pay into Court a sum of stock representing a trust fund belonging to T., which he had appropriated to his own use, paid into Court, in compliance with this order, a sum of stock belonging to another *cestui que trust*, B. The question was, whether B. had a right to follow this fund as against T. It was held, that B. had no such right. Their equities were equal; and the Court having acquired the legal interest on behalf of T.'s estate, this was deemed to create a sufficient preference in T.'s favour (z), the transfer being for valuable consideration and without notice.

From this reasoning and the authorities bearing on this case, may be deduced the following rules as to the following of trust property:—

(1.) If the fund comes into the hands of a volunteer, that is, without the payment of valuable consideration, then, *whether or not the holder had notice* of the trust, the fund may be followed and reclaimed by the *cestui que trust* (a).

(2.) If it is in the hands of a purchaser for value, *with*

(z) See also a similar recent case, *Taylor v. Blacklock*, 32 Ch. D. 560. (a) *Mansell v. M.*, 2 P. Wms. 681.

notice of the trust, then also the fund may be followed; for the payment, being made with his eyes open, is deemed to be made voluntarily (b).

(3.) But if the holder of the fund is a *bonâ fide* purchaser for value *without notice*, then his title cannot be impeached, as is seen by the principal case, above referred to.

The student is referred to a later page (p. 319 *et seq.*) for a more detailed consideration of the protection which may be secured to a purchaser by the acquisition of the legal estate, than would at this stage of the subject be desirable. Here, it may suffice to say, generally, that no party to a fraudulent bargain will be suffered to derive any benefit from it, and that all persons who obtain possession of trust funds with knowledge that their title is derived from a breach of trust, will be compelled to restore such trust funds (c).

Conversion of
trust fund.

2. Another class of considerations arises when the trust fund has been not only appropriated but converted by the trustee into property of another form; as, for instance, where trust money has been laid out in land, or trust land converted into money. In such cases the general rule is, that the *cestui que trust* may attach and follow the property that has been substituted for the trust estate, so long as its metamorphoses can be traced.

As long as the property is in the hands of the trustee in any form no difficulty arises. A trustee that mixes trust moneys with his own is clearly liable to the *cestui que trust* for so much of the blended fund as he cannot prove to be his own (d). So, if the trustee purchases land partly with his own money and partly with trust money, the *cestui que trust* has clearly a lien on the whole estate for the amount of his fund (e).

(b) *Boursot v. Savage*, 2 Eq. 134.

(c) See Lewin on Trusts, 8th ed.
p. 862; *Gray v. Lewis*, 8 Eq. 526.

(d) *Fellows v. Mitchell*, 1 P. Wms.

83; *Mason v. Morley*, 34 Beav.
475.

(e) *Lane v. Dighton*, Amb. 409;
Hopper v. Conyers, 2 Eq. 549.

Difficulties, however, often arise when the trust property has found its way in another form into the hands of a third person. In such cases the principle above enounced applies; the fund can be followed as long as it can be identified, in the hands of any one who has notice of the trust. There is no distinction in principle between money in the form of coin and money in the form of notes or bills; but obviously, in the former case, the task of identification is so difficult as to be possible only under particular circumstances (*f*).

If a trustee mixes trust funds with his own in the hands of a banker, and draws on the combined account, his drawings will be attributed to his private moneys, so as to leave the trust moneys intact (*g*). If he mixes two trust funds in his bank account, then the sums drawn out will, in the absence of evidence to the contrary, be attributed in order to the earliest deposits, in accordance with a rule which will elsewhere be more fully considered (*g*).

II. Personal remedies.—(1.) A breach of trust by a trustee creates an obligation of the nature of a debt to the *cestui que trust*. Notwithstanding the acceptance of the trust by deed, such a debt ranks only as a simple contract debt, unless the deed contains a covenant, express or implied, for payment of the trust fund, and has been executed by the trustee (*h*); but by the Judicature Act, 1873, s. 25, sub-s. 2, the debt is not in the case of an express trust held to be barred by the Statute of Limitations; and, as will be seen hereafter, the distinction between simple contract and specialty debts has now ceased to be practically important (*i*).

Proceedings in equity in respect of a breach of trust may be taken not only against trustees or executors, but

Breach of trust a simple contract debt.

Generally proceedings in equity

(*f*) *Ford v. Hopkins*, 1 Salk. 283; *Harris v. Truman*, 7 Q. B. D. 340; 9 *ibid.* 264.

(*g*) *Re Hallett's Estate*, 13 Ch. D. 696, overruling *Pennell v. Deffell*, 4

De G. M. & G. 772, *infra*, p. 504.

(*h*) *Isaacson v. Harwood*, 3 Ch. 225; *Richardson v. Jenkins*, 1 Drew. 477.

(*i*) *Infra*, pp. 520, 526.

against trustees or their representatives.

Statutes of Limitation not applicable.

Effect of decree.

Contribution.

Cestui que trust acquiring in breach of trust.

Bankruptcy of trustee.

also against their representatives, even though the loss may not have occurred until after the death of such trustees (*k*), and although they may have distributed the assets without notice of the breach of trust, unless they have done so by order of the Court (*l*), or pursuant to 22 & 23 Vict. c. 35, s. 29; and the Statutes of Limitation are no more available for the representatives than for trustees themselves (*m*). Nor will a settlor, who has covenanted to pay a sum of money, and so constituted himself trustee thereof, be able to set up the statute in defence (*n*).

Where several trustees are all guilty of a breach of trust, although the *cestui que trust* may have obtained a decree against them jointly, its effect is several also, and he may proceed to take out execution against any one of them alone (*o*); but as between the trustees themselves, any one so paying is entitled to contribution, which may in a proper case be ordered in the same suit (*p*). As between the trustees themselves the loss may be thrown primarily upon the trustee most in fault, or his estate (*q*).

Where a *cestui que trust* derives any profit from a breach of trust, he will to that extent be bound to recoup the trustee (*r*); and if a *cestui que trust*, with knowledge of the fact, receives the income from an improper investment, he is bound to give credit for the difference between it and the income which would have arisen from a proper investment of the trust fund (*s*).

(2.) When a trustee becomes bankrupt, what he owes to the trust may be proved against his estate (*t*), deducting,

(*k*) *Devaynes v. Noble*, 24 Beav. 197.

(*l*) *March v. Russell*, 3 My. & Cr. 31; *Taylor v. T.*, 10 Eq. 477.

(*m*) *Obee v. Bishop*, 1 De G. F. & J. 137; *Butler v. Carter*, 5 Eq. 276; Jud. Act, 1873, s. 25, sub-s. 2.

(*n*) *Stone v. S.*, 5 Ch. 74.

(*o*) *Exp. Shakeshaft*, 3 Bro. C. C.

(*p*) *Priestman v. Tindall*, 24 Beav. 244.

(*q*) *Fetherstone v. West*, 6 I. R. Eq. 86.

(*r*) *Trafford v. Boehm*, 3 Atk. 440.

(*s*) *Davies v. Hodgson*, 25 Beav. 177.

(*t*) *Exp. Shakeshaft*, *sup.*

however, the value of any beneficial interest which he himself may have in the trust estate (*u*). Although the original debt is barred when a bankrupt trustee obtains his order of discharge (*x*), nevertheless it having been the trustee's duty to prove the debt for the benefit of the *cestui que trust*, he will, if he has neglected so to do, be liable for the consequent loss, notwithstanding his discharge (*y*). The original debt is not indeed revived, but a fresh liability springs from the negligent breach of trust. Neglect to prove.

Where all the trustees are bankrupt, proof may be made against the estates of all, provided that not more than 20s. in the pound is recovered (*z*).

(3.) If trustees are *expressly* bound by the terms of their trust to invest money in the public funds, and, instead of doing so, retain it in their own hands, the *cestui que trust* may elect to charge them either with the amount of money, or with the amount of stock they might have purchased therewith (*a*). An executor, however, so retaining money will only be charged with simple interest at four per cent., unless there are circumstances showing that he has profited by his misconduct (*b*). Remedy for neglect to invest.

If trustees are directed to invest on *Government or real securities*, and they do neither, the *cestui que trust* has not the option of charging them with the moneys which would have been produced by an investment in the funds; he is only entitled to his trust fund with four per cent. interest (*c*).

If there are several distinct unauthorised investments by trustees, in some of which a loss is incurred, and, in others, a gain accrues, they may not set off the gain Trustee may not set off profits against losses.

(*u*) *Exp. Turner*, 2 De G. M. & G. 927.

(*x*) *Exp. Holt*, 1 Deac. 248.

(*y*) *Orrett v. Corser*, 21 Beav. 52.

(*z*) *Kebble v. Thompson*, 3 Bro. C. C. 112.

(*a*) *Shepherd v. Moulds*, 4 Ha. 500, 504.

(*b*) *Att.-Gen. v. Alford*, 4 De G. M. & G. 843; and see *Powell v. Hulkes*, 33 Ch. D. 552.

(*c*) *Robinson v. R.*, 1 De G. M. & G. 247; *Marsh v. Hunter*, 6 Mad. 295; cf. *Shepherd v. Moulds*, *supra*, Lewin, p. 336.

Remedy of
cestui que
trust when
barred by ac-
quiescence,
concurrence,
or release.

against the loss. The *cestui que trust* may retain the gain, and still claim to have the loss made good (*d*).

(4.) The remedy of a *cestui que trust* who is *sui juris* may be barred by his acquiescence, or concurrence, or by his executing a release (*e*). But persons under disability do not so lose their remedy unless they have by their own fraud induced the breach of trust (*f*). A married woman, however, being treated as a *feme sole* as regards her separate estate, may bind it by her concurrence in a breach of trust (*g*), unless she was either herself deceived, or under undue influence (*h*), or was restrained from anticipation (*i*).

Misrepresentation or concealment on the part of trustees will prevent their defending themselves on the ground of the *cestui que trust's* acquiescence (*j*). And mere connivance of a *cestui que trust* at a breach of trust from which he derives no benefit, will not prevent his complaining of the transaction long after he first discovered it (*k*).

Similarly the execution of a release or confirmation will not prevent his taking action unless he has full knowledge of the facts of the case (*l*) and of their legal effect (*m*).

(5.) Fraudulent breaches of trust are not only actionable but also indictable (*n*), after leave obtained from the Attorney-General or from the judge before whom any civil proceedings respecting the trust have been taken (*o*).

III. Removal of trustees.—Although, on the one hand, a trustee who accepts a trust cannot at will relinquish the office, unless, indeed, the instrument creating the trust

Jurisdiction
to remove
trustees.

(*d*) *Robinson v. R.*, 11 Beav. 371, 375.

(*e*) See *Brice v. Stokes*, 11 Ves. 319; *Walker v. Symonds*, 3 Swanst. 1, 64.

(*f*) *Montfort v. Cadogan*, 19 Ves. 635, 639, 640; *Wilkinson v. Parry*, 4 Russ. 272, 276; *Savage v. Foster*, 9 Mod. 35.

(*g*) *Clive v. Carew*, 1 J. & H. 199.

(*h*) *Whistler v. Newman*, 4 Ves. 129.

(*i*) *Cocker v. Quayle*, 1 Russ. & My. 535; *Ellis v. Johnson*, 31 Ch. D. 537.

(*j*) *Walker v. Symonds*, *supra*.

(*k*) *Phillipson v. Gatty*, 7 Hare, 516.

(*l*) *Randall v. Errington*, 10 Ves. 423.

(*m*) *Cockrell v. Cholmeley*, 1 Russ. & My. 425.

(*n*) 24 & 25 Vict. c. 96.

(*o*) S. 80.

confers a special power so enabling him; and, on the other hand, a *cestui que trust* has no power, at his mere will, to dismiss a trustee from his office, the Court has ample authority to remove any difficulty which might arise in the administration of the trust through the unwillingness or unfitness of the trustee.

Apart from the statutory powers presently to be referred to, there is an inherent jurisdiction in a Court of equity to remove a trustee and appoint another in his place, whenever such a step is desirable for the welfare of the beneficiaries and the trust estate (*p*). This jurisdiction will not be exercised at the mere caprice of a *cestui que trust* (*q*), nor on the ground of an honest exercise of discretion in a manner which may prove to be prejudicial to the *cestui que trust* (*r*), nor even for mistake in the execution of his duty (*s*); a reasonable cause for such interference must be shown.

It has been considered a sufficient cause that the trustee has permanently departed out of the jurisdiction of the Court (*t*); that he has become bankrupt (*u*); that he has dealt with the trust property for his own advancement (*x*); or suffered a co-trustee to commit a breach of trust (*y*); or absconded on a charge of forgery (*z*); or, to speak generally, has been guilty of such acts or omissions as endanger the trust property, or show a want of honesty or of proper capacity to execute the duties (*a*). Under such circumstances the Court may not only remove a trustee, but fix him with the costs of such removal, and the appointment of a successor (*b*).

When exercised.

Where the Court so interferes it will proceed to appoint

Principles guiding ap-

(*p*) Story's Eq. Jur. s. 1287; *Letterstedt v. Broers*, 9 App. C. 371.

(*q*) *O'Keefe v. Calthorpe*, 1 Atk. 18.

(*r*) *Lee v. Young*, 2 Y. & C. C. C. 532.

(*s*) See *Att.-Gen. v. Coopers' Co.*, 19 Ves. 122.

(*t*) *O'Reilly v. Alderson*, 8 Hare, 101.

(*u*) *Bainbridge v. Blair*, 1 Beav. 495; *Re Barker's Tr.*, 1 Ch. D. 43; and see B. A. 1883 (46 & 47 Vict. c. 52), s. 147.

(*x*) *Exp. Phelps*, 9 Mod. 357.

(*y*) *Exp. Reynolds*, 5 Ves. 707.

(*z*) *Millard v. Eyre*, 2 Ves. jr. 94.

(*a*) Story's Eq. Jur. s. 1289.

(*b*) *Exp. Greenhouse*, 1 Mad. 92.

pointment of
new trustees.

new trustees to fill the office, and in so doing will be guided (1) by the wishes of the creator of the trust, if ascertainable; (2) by a due regard for the interests of all parties concerned, not favouring any particular class; and (3) by the nature of the trust and the question by whose instrumentality it can best be carried into execution (c).

New trustees
under Trustee
Act, 1850.

But this jurisdiction, though sufficiently wide, could only be exercised after the bringing of an action for the purpose by or on behalf of the *cestuis que trusts*; and it has been found convenient to provide by statute a more swift and economical method of removing and replacing trustees. Accordingly, by the Trustee Act, 1850 (d), it was enacted that "whenever it shall be expedient to appoint a new trustee or new trustees, and shall be found inexpedient, difficult, or impracticable to do so without the assistance of the Court, it shall be lawful for the Court to make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees" (e). This power may be exercised whether there is any existing trustee or not (f), and persons appointed under these Acts have all the same rights and powers as they would have had if appointed by a decree in an action (g). By these enactments the necessity of bringing an action has, in many cases, been dispensed with, a sufficient remedy being obtainable by petition to the Court.

Conveyancing
Act, 1881.

But the necessity for applying to the Court at all has been greatly reduced by the extensive facilities for the appointment of new trustees afforded by the Conveyancing Act, 1881 (h), which provides that when a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be dis-

(c) *Re Tempest*, 1 Ch. 485; Lewin Tr. 850.

(d) 13 & 14 Vict. c. 60.

(e) Sect. 32.

(f) 15 & 16 Vict. c. 55, s. 9.

(g) Sect. 33.

(h) 44 & 45 Vict. c. 41.

charged from the trusts or powers reposed in or conferred upon him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for this purpose by the instrument, if any, creating the trust, or if there is no such person or no such person able and willing to act, then the surviving or continuing trustees or trustee "for the time being, or the personal representatives of the last surviving or continuing trustee" may, by writing, appoint another person or other persons "to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing or being unfit, or being incapable as aforesaid"; and the Act further provides for the vesting of the trust property in the new trustees, or in them jointly with the continuing trustees, as the case may require (*i*).

Provisions for the relief of trustees.—This is a convenient place in which to mention certain provisions for the protection and relief of trustees who are embarrassed in the execution of their trusts.

By Lord St. Leonards' Act (*j*), trustees are enabled to apply to the Court by petition, or to a judge at Chambers by summons, upon a written statement, for the opinion or direction of the judge respecting the management or direction of the trust property. The power thus given does not apply to cases which require an investigation of facts or an adjudication upon nice questions of law. The object of the Act was to procure for trustees, at small expense, the assistance of the Court upon points of minor importance arising in the management of the trust; upon such points, for instance, as the propriety of certain investments, the payment of debts, or legacies, or income, or the granting of leases, or the exercising of a power of sale (*k*). A trustee acting under such advice is indemnified from the

Application
for advice
and direction.
22 & 23 Vict.
c. 35.

(*i*) See also 45 & 46 Vict. c. 39, s. 5; *Re Moss's Tr.*, 37 Ch. D. 513.

(*k*) See Lewin on Tr., p. 619; *Re Lorenz Sett.*, 1 Dr. & Sm. 401.

(*j*) 22 & 23 Vict. c. 35, s. 30.

consequences, provided there is no *suggestio falsi* or *suppressio veri* in the case laid before the judge.

Trustee Relief Act, 1847.

Another statute provides relief for trustees in cases of greater difficulty, where, for instance, a disputed question of construction arises. By the Trustee Relief Act (1), trustees and executors or other persons having in their hands moneys belonging to any trust may pay the same into the Bank of England, or to the account of the Paymaster-General of the Chancery Division, in the matter of the particular trust, or they may transfer or deposit trust stocks and securities into or in the name of such Paymaster-General in such matter; and thereupon, upon petition to the Court, the Court may make such orders as may be necessary in respect of the trusts, moneys, stock or securities, and for the investment and payment of any such moneys, or any dividends or interest thereof, and for the transfer and delivery of any such stocks and securities, and for the administration of any such trusts generally. The trustees or other persons so paying or disposing of their trust funds are thereupon discharged from their duties as to such funds; but the relief afforded by the Act should not be resorted to unless a difficulty presents itself in the administration of the trust. Applications under this Act must now be by summons, under Ord. LV. r. 2, in cases where the fund in question does not exceed £1,000.

Judicature Act, 1873, O. LV.

Again, under Order LV. rule 3 of the Judicature Act, 1873 (m), trustees or executors may apply by originating summons for the determination of any question arising in the administration of the estate or trust.

Action for administration.

And, finally, it is open to trustees in a proper case to throw the whole *onus* of the administration of the estate or trust on the Court by the commencement of an action for that purpose, either by writ or by originating summons, under Order LV. rule 4.

(1) 10 & 11 Vict. c. 96, amended by 12 & 13 Vict. c. 74. (m) 36 & 37 Vict. c. 66.

VI. *Remuneration of Trustees.*

- i. *General principle.*
Robinson v. Pett.
- ii. *Limits of the principle.*
- iii. *To whom it applies.*

i. *General principle.*

The leading case of

ROBINSON v. PETT

[3 P. Wms. 249; 2 W. & T. L. C. 207]

is usually cited as establishing the rule that the Court of Chancery will not allow an executor or trustee to claim payment for his time and trouble in executing his trust, especially when an express legacy is provided for his pains.

It is a well-established principle in equity that a trustee shall not be permitted to profit by his trust, and one of the most important deductions therefrom is the rule illustrated by this case.

The acceptance of the office of trustee being optional, no hardship is occasioned by requiring that the performance of its duties shall be gratuitous; while if remuneration was allowed, it is evident that it would be difficult if not impossible to keep it within reasonable bounds, and to prevent the frequent and excessive burdening of trust estates.

The rule thus enunciated is sufficiently simple, but in order to an adequate appreciation of its scope it is necessary to observe carefully some instances of its application to the ever-varying circumstances which occur in practice. The first inquiry will be, What are the limits of the application of the principle? Secondly, To what persons does it extend?

ii. *The limits of the application of the principle.*

Extent of the trouble and of the benefit resulting immaterial.

1. It matters not to what extent the trustee may have devoted himself to the duties of the trust, or to what extent the trust has been thereby benefited. As we shall presently see, he is entitled to be repaid pecuniary expenses actually and properly incurred, but though he may have even carried on a trade or business at a great sacrifice of time and thought, he can claim no compensation for his personal trouble or loss of time (e).

Indirect or collateral benefits not allowed.

2. Not only is a trustee not entitled to direct remuneration for time and trouble devoted to the trust, but he is not suffered by any indirect or collateral means to obtain an advantage out of his position. Two extensive classes of cases coming under this head have already been considered in dealing with constructive trusts, where we have seen that a trustee is disabled from taking advantage of his position to benefit himself by means of any dealings with the trust estate or with his *cestui que trust*. But the cases go farther than that. Thus, though the legal estate in land is vested in a trustee, it has been held that he cannot by means thereof claim the right of sporting over the land. If the sporting could be let for the benefit of the *cestui que trust*, it should be; if not, the game would belong to the heir (f). A trustee cannot sell his office. If he attempts to do so, any money so paid to him will be considered part of the trust fund (g).

Such as sporting over trust estate.

Selling his office.

Being appointed receiver with a salary.

A trustee also will not in general be appointed receiver with a salary (h), but he may be so employed if no one else can be procured who will act with the same benefit to the estate (i). If he even offers to act as receiver without a salary, he will only be appointed on the ground that it is

(e) *Brocksopp v. Barnes*, 5 Madd. 90; *Barrett v. Hartley*, 2 Eq. 789.

(f) *Webb v. E. of Shaftesbury*, 7 Ves. 480, 488.

(g) *Sugden v. Crossland*, 3 Sm. &

G. 192.

(h) *Anon.*, 3 Ves. 515; *Nicholson v. Tutin*, 3 K. & J. 159.

(i) *Sykes v. Hastings*, 11 Ves. 363, 364.

for the benefit of the estate, because it is the trustee's duty to see critically that the receiver does his duty (*k*).

3. Nor can a trustee utilise the trust funds in any way for his own benefit. If he improperly retains such in his own hands, even though it be not shown that he made any profit thereby, he will be charged with interest thereupon (*l*). If he employs them in any trade or adventure of his own, the *cestui que trust* may either insist on having the profits made by such trade or on having the trust fund replaced with interest (*m*). Thus if the adventure be successful the *cestui que trust* gets all the benefit; if it fail the trustee must account for the fund with interest, ordinarily at 4 per cent., but not limited thereto (*n*). Should a difficulty arise in any case as to the tracing and apportioning of the profits derived by a trustee or executor from the employment of trust funds together with his own in any trade or speculation, it may be a reason for preferring a fixed rate of interest to an account of the profits; and it seems that the usual rate in such cases would be 5 per cent. with yearly rests; *i.e.* compound interest (*o*). For further review of a trustee's liability in respect of investments, see *supra*, pp. 118—123.

He may not use the trust funds for his benefit.

Such being the general doctrine in its full extent, we now inquire what allowances to trustees are not deemed to be profits within the meaning of the rule, and which, therefore, they are entitled to claim, and also what circumstances may suffice to raise exceptions to the rule.

4. Trustees are allowed all proper expenses out of pocket, whether provided for in the instrument creating the trusts or not (*p*), and none the less that remuneration for their trouble has been allowed them by the author of

But trustees are allowed out of pocket expenses,

(*k*) *Hibbert v. Jenkins*, 11 Ves. 363, cited.

(*l*) *Pearse v. Green*, 1 J. & W. 135; *Blogg v. Johnson*, 2 Ch. 225, 229.

(*m*) *Docker v. Somes*, 2 My. & K. 655; *Townend v. T.*, 1 Giff. 201.

(*n*) *Tebbs v. Carpenter*, 1 Madd. 290; *Forbes v. Ross*, 2 Cox, 116.

(*o*) *Jones v. Foxall*, 15 Beav. 392. But see *Emmet v. E.*, 17 Ch. D. 142.

(*p*) *Hide v. Haywood*, 2 Atk. 126; *Worrall v. Harford*, 8 Ves. 4, 8.

properly incurred, the trusts (*q*). Thus they are allowed travelling expenses (*r*); law expenses (*s*), unless they were improper, or the litigation arose from their own fault or negligence (*t*); all necessary and proper expenses incurred in protecting the trust property, for instance, watching or opposing a bill in Parliament for that purpose (*u*); all proper outlay for the improvement of the property, with interest thereon (*x*), for paying off of incumbrances thereon (*y*), or defending the title thereof (*z*). They are also entitled to be indemnified by their *cestui que trust* from any liability arising from their holding shares in his name (*a*), and from the costs of any action commenced against them in their fiduciary character or in relation to the trust estate (*b*).

Lien for expenses Not only is a trustee entitled to such expenses, but he has a lien on the trust estate to secure them, which must be satisfied before the *cestui que trust* can compel a reconveyance from the trustees (*c*). Such lien has priority over the costs of a suit for the administration of the trust fund (*d*). If the trust estate no longer exists the trustees may proceed against the *cestui que trust* personally (*e*).

When agents may be employed. 5. Though the office of trustee, being one of personal confidence, cannot be delegated, trustees may in special cases employ agents, whose expenses will be allowed out of the estate. Thus, upon making out a proper case, a trustee may employ a bailiff to manage an estate and receive the rents (*f*), even though a recompense may have been given

(*q*) *Wilkinson v. W.*, 2 S. & S.

237.

(*r*) *Exp. Lovegrove*, 3 D. & C.

763.

(*s*) *Poole v. Pass*, 1 Beav. 600.

Amand v. Bradbourne, 2 Ch. Ca.

138.

(*t*) *Peers v. Ceeley*, 15 Beav. 209;

Gaffrey v. Darby, 6 Ves. 488; *Mal-*

colm v. O'Callaghan, 3 My. & C. 52.

(*u*) *Bright v. North*, 2 Ph. 216.

(*x*) *Quarrel v. Beckford*, 1 Madd.

269, 282.

(*y*) *Balsh v. Higham*, 2 P. Wms.

453.

(*z*) *Sanders v. Hooper*, 6 Beav.

246.

(*a*) *James v. May*, 6 L. R. H. L.

328.

(*b*) *Benett v. Wyndham*, 4 De G.

F. & J. 259; *Att.-Gen. v. M. of*

Norwich, 2 My. & Cr. 406.

(*c*) *Re Exhall Coal Co.*, 35 Beav.

449.

(*d*) *Morison v. M.*, 7 De G. M. &

G. 214, 226.

(*e*) *Balsh v. Higham*, *sup.*

(*f*) *Bonithon v. Hickmore*, 1 Vern.

316; *Stewart v. Hoare*, 2 Bro. C.

C. 663.

him by the creator of the trust for his trouble (*g*). So a solicitor or an accountant may be employed where necessary (*h*), or an agent to collect debts at a reasonable commission (*i*). But if a solicitor or other such agent is employed to do things which the trustee ought strictly to have attended to himself, his charges will not be allowed (*k*).

6. It is quite open for the creator of the trust to authorise a trustee to charge for services rendered, and in doing so either to fix the amount of compensation or to leave it open. The most ordinary case of such allowances being authorised is where a solicitor is appointed trustee, with power to charge for professional services rendered. If the amount of the sum or salary to be paid in consideration of such services is specified, no question can arise; if the compensation is not so fixed a reference will be directed to settle what is a proper allowance (*l*). It appears that such authorisation may arise from implication if clear (*m*). The position of a solicitor-trustee is considered in greater detail below, p. 146.

Remuneration may be authorised by creator of the trust.

An annuity given to an executor for his trouble until a general settlement of the testator's affairs, was held not to cease on the institution of an administration suit (*n*); but where an annuity was given to a trustee as long as he should continue to execute the office of trustee, it was held that it ceased upon the termination of all active duties upon the payment of the whole of the trust fund to a person absolutely entitled (*o*). If such an annuity or other remuneration is authorised, and the trustee does not act, even though he be rendered incapable of so doing by the act of God, he is not entitled to receive it (*p*).

(*g*) *Wilkinson v. W.*, *sup.*

(*h*) *Macnamara v. Jones*, 2 Dick. 587; *Henderson v. McIver*, 3 Madd. 275.

(*i*) *Hopkinson v. Roe*, 1 Beav. 180; *Weiss v. Dill*, 3 My. & K. 26.

(*k*) *Harbin v. Darby*, 28 Beav. 325.

(*l*) *Ellison v. Airey*, 1 Ves. jr. 115; *Willis v. Kibble*, 1 Beav. 559.

(*m*) *Douglas v. Archbutt*, 2 De G. & J. 148.

(*n*) *Baker v. Martin*, 8 Sim. 25.

(*o*) *Hull v. Christian*, 17 Eq. 546.

(*p*) *Hanbury v. Spooner*, 5 Beav. 630; *Slaney v. Watney*, 2 Eq. 418.

Or trustee
may contract
for remunera-
tion with the
cestui que
trust.

7. A trustee may contract with his *cestui que trust* to receive some remuneration for acting or to make professional charges for so doing. But such a contract would be jealously watched by the Court, and would be set aside, unless it were perfectly fair, and obtained without any undue influence (*q*); and the contract must in distinct terms take the trustee out of the general rule (*r*).

Or with the
Court.

8. A trustee may also contract with the Court that he will not undertake the trust without proper compensation; and if he undertake the trust upon the understanding that application should be made to the Court for compensation, a reference will be made to chambers to ascertain and settle what would be a reasonable allowance for his past and future services (*s*).

Lapse of real
estate.
Burgess v.
Wheate.

9. Formerly, a trustee might sometimes, from accidental circumstances, profit by his trust in a manner quite irrespective of any claim for remuneration or compensation. Where, for instance, a *cestui que trust* died intestate and without heirs, the trustee was entitled to the benefit of any realty vested in him as such, subject to the rights of creditors of the deceased *cestui que trust*. This accidental benefit accrued to him, however, not from the strength of any title of his own, but because no other person can show any title at all (*t*). The only person who could put in any claim would be the lord or the Crown, on the ground of escheat; and in that case it was decided that where the legal estate was already vested there was no escheat, or right to compel a conveyance from the trustee.

The same principle was applied to copyholds in favour of a trustee as against the lord of the manor (*u*), and to a mortgage in fee where the mortgagor died intestate and without heirs (*v*).

(*q*) *Ayliffe v. Murray*, 2 Atk. 58.

(*r*) *Moore v. Froud*, 3 My. & C. 45.

(*s*) *Marshall v. Holloway*, 2 Swanst. 432, 453; *Morrison v. M.*, 4 My. & C. 215.

(*t*) *Burgess v. Wheate*, 1 Eden, 177.

(*u*) *Gallard v. Hawkins*, 27 Ch. D. 298.

(*v*) *Beale v. Symonds*, 16 Beav. 406.

But now, by the Intestates' Estates Act, 1884 (x), where a person dies without an heir and intestate as to any equitable estate or interest in any corporeal or incorporeal hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat shall apply in the same manner as if the estate or interest were a legal estate in corporeal hereditaments.

Intestates' Estates Act, 1884.

The trustee of freeholds has, therefore, no longer the chance of profiting by a failure of heirs; and apparently the statute would take effect as to copyholds in favour of the lord of the manor.

In the case of personalty, if a *cestui que trust* dies intestate and without next of kin, the Crown by virtue of its prerogative can claim the chattels as *bona vacantia* (y).

No advantages in case of personal estate.

Before 1 Will. IV. c. 40, where a testator made no express disposition of the residue of his personalty, the executors were at law entitled thereto; nor did Courts of equity interfere with their enjoyment, unless it appeared to be the testator's intention to exclude them from interest therein. By that Act, however, as to wills made since the 1st Sept., 1830, executors are declared to be trustees of such undisposed of residue for the next of kin under the Statute of Distributions, unless it should appear by the will that the executors were intended to take it beneficially. The onus of proving an intention in their favour is thus thrown upon them (z).

1 Will. IV. c. 40.

iii. *To what persons the doctrine applies.*

1. In *Robinson v. Pett* (a), under circumstances somewhat strongly in favour of allowing remuneration if possible, it was refused to one who was appointed to the office of trustee and executor, notwithstanding that he had

Trustees and executors.

(x) 47 & 48 Vict. c. 71, s. 4.

(z) *Harrison v. H.*, 2 H. & M.

(y) *Powell v. Merrett*, 1 Sm. & G.

237.

381; *Middleton v. Spicer*, 1 Br. C.

(a) 3 P. Wms. 249.

C. 201.

renounced the executorship. Express trustees and executors are, therefore, seen to be most fully under the operation of the rule.

Of whatever
occupation.

It matters not that the executor has been carrying on the business of a deceased partner (*b*), nor what his occupation or employment in life; for instance, neither a factor (*c*), nor a commission agent (*d*), nor an auctioneer (*e*), is allowed, without such authority as has been above mentioned, to make business or professional charges for work done in the execution of a trust which he has undertaken.

Solicitor
trustee.

2. A solicitor who is appointed executor or trustee is within the rule (*f*), but this case requires special consideration.

Not only is such a solicitor personally disqualified from receiving remuneration, but it has been held that the firm to which he belongs is equally unable to charge the *cestui que trust* save for out of pocket costs and expenses (*f*), even though the business was actually attended to by a partner who was not a trustee (*h*).

There are, however, certain special limitations of the principle as applied to solicitors. Thus—

Exceptions.
Business in
an action.

(1.) Where *business is done in an action*, whether hostile or not, or even in *friendly proceedings*, such as an application for maintenance of an infant, a solicitor trustee or his firm may receive the usual charges, if acting for himself and his co-trustee; but no greater cost must be allowed than if the solicitor acted for the co-trustee alone (*i*).

Employment
of partner.

(2.) An agreement between solicitors in partnership, that the one who is appointed trustee is not to participate in any of the profits or to derive any benefit from the

(*b*) *Burden v. B.*, 1 V. & B. 170.
(*c*) *Scattergood v. Harrison*, Mos.
128.
(*d*) *Sherriff v. Aze*, 4 Russ. 33.
(*e*) *Kirkman v. Booth*, 11 Beav.
273.
(*f*) *Broughton v. B.*, 5 De G. M.
& G. 160.

(*h*) *Christophers v. White*, 10
Beav. 523; *Lincoln v. Windsor*, 9
Ha. 158; *Burgess v. Vinicombe*, 34
Ch. D. 77.
(*i*) *Cradock v. Piper*, 1 Mac. & G.
664; *Lawton v. Elwes*, 34 Ch. D.
675.

business done for the trusts, has been considered sufficient to admit of his partner being employed as solicitor on usual terms (*k*).

(3.) A solicitor trustee, who had invested the trust funds on mortgage, and, in doing so, acted for the mortgagor, was held entitled to retain professional charges paid by the mortgagor (*l*). But profit costs of preparing leases of the trust estate have been disallowed, although paid by the lessees (*m*).

Charges
against third
persons.

(4.) The costs of the town agent of a solicitor trustee are allowed (*n*).

Town agent's
costs.

(5.) Of course, if the testator or settlor creating the trust appoints a solicitor trustee, and expressly authorizes him to make the usual professional charges, he is entitled to do so (*o*). But his charges will be strictly limited to such as are well within the authorization of the instrument creating the trust (*p*); and it will require special provisions to permit of charges for any services not strictly professional; services, for instance, such as an ordinary trustee ought to have done without the intervention of a solicitor.

3. A mortgagee with power of sale stands in a fiduciary relation with regard to the mortgagor, and so will not be allowed, either alone or conjointly with his partner in any business, *e. g.*, as auctioneers, to derive any profit from the sale (*q*). But a solicitor mortgagee, acting on behalf of the mortgagees, has been held entitled to profit costs against the mortgagor (*r*).

Mortgagees.

4. The trustee of a bankrupt, who acted as solicitor to the fiat, though allowed to charge for his clerk's time employed in the business of the bankruptcy, was not allowed to make any profit thereupon (*s*).

Trustee in
bankruptcy.

(*k*) *Clack v. Carlon*, 7 Jur. N. S. 441.

(*p*) *Newton v. Chapman*, 27 Ch. D. 584.

(*l*) *Whitney v. Smith*, 4 Ch. 513.

(*q*) *Matthison v. Clarke*, 3 Drew. 3.

(*m*) *Lawton v. Elwes*, *sup.*

(*r*) *Re Donaldson*, 27 Ch. D. 544.

(*n*) *Burge v. Brutton*, 2 Ha. 373.

(*s*) *Exp. Newton*, 3 De G. & Sm. 584.

(*o*) *Ames v. Taylor*, 25 Ch. D. 72; *Harbin v. Darby*, 28 Beav. 325.

Agents.

5. An agent entrusted with money or any other property for the purpose of using it for the owner's benefit, cannot make any profit by the use thereof. Instances of such disqualification being considered to attach to agency are seen in the cases of a vendor of public stamps (*t*), the master of a ship (*u*), and a part-owner of or partner in a ship acting as ship's husband (*x*).

Chairman and directors of companies.

6. A chairman or director of a company stands in a fiduciary relation towards the company; and will not as a rule be allowed to derive any profit beyond his salary from his office (*y*); and see also pp. 100, 613.

Constructive trustees not so strictly treated.

7. The principle does not apply in all its strictness to a person who is merely a constructive trustee. Though he must account for the profits of trust money employed, he will have an allowance made to him for his expenditure of time, skill, and trouble (*z*). Thus, a surviving partner is in a sense a trustee for the estate of the deceased partner, but the trust is limited to the performance of the obligation. Time runs in his favour (*a*), and if he continues the business, though he must account for the profits, he is entitled to a proper allowance for the trouble of management (*b*).

Surviving partner.

Managers of West Indian estates excepted.

8. There is a marked exception from the usual rule in the case of trustees and guardians managing the estates of West Indian proprietors. By the West Indian Acts of Assembly such managers are entitled to a commission not exceeding 6 per cent. as long as they personally take care of the management and improvement of the estates committed to their charge (*c*). A mortgagee of West Indian estates, as long as he is out of possession, may stipulate for

(*t*) *Att.-Gen. v. Edmunds*, 6 Eq. 381.

(*u*) *Shallcross v. Oldham*, 2 J. & H. 609.

(*x*) *Miller v. Mackay*, 31 Beav. 77.

(*y*) *Great Luxembourg Ry. Co. v. Magnay*, 25 Beav. 586.

(*z*) *Brown v. Litton*, 1 P. Wms. 140.

(*a*) *Knox v. Gye*, 5 L. R. H. L. 656.

(*b*) *Featherstonehaugh v. Fenwick*, 17 Ves. 298; *Vyse v. Foster*, 7 L. R. H. L. 318, 329.

(*c*) *Chambers v. Goldwin*, 5 Ves. 834; 9 Ves. 254.

the consignment of the produce, and charge commission on the net produce as his compensation. But when he is in possession he stands in the same position as a mortgagee in possession in England; and therefore, if he chooses to be consignee himself, he has no commission (*d*).

(*d*) *Faulkner v. Daniel*, 3 Ha. 199, 218; *Leith v. Irvine*, 1 My. & K. 277.

CHAPTER II.

FRAUD.

Distinction between Law and Equity.

Classification of Frauds.

Chesterfield v. Janssen.

I. *Actual Fraud.*

1. *Arising from wrongful acts.*

Attwood v. Small.

2. *Arising from wrongful omissions.*

II. *Transactions deemed on general grounds inequitable.*

1. *Fraud presumed from the nature of the transaction.*

2. *Fraud presumed from the circumstances or relation of the parties.*

Huguenin v. Baseley.

III. *Frauds on public policy.*

IV. *Frauds on the private rights of third persons.*

Barry v. Crosskey.

Savage v. Foster.

Aleyn v. Belchier.

THERE is no part of equitable jurisprudence more beneficial, and probably none of more ancient date, than its jurisdiction to give relief in circumstances of fraud. In the early days of the Court of Chancery it would seem that no cause more frequently induced suitors to seek its assistance than the fact that it granted relief in the case of many transac-

tions which would not have been deemed fraudulent in the Courts of Common Law.

It has never been possible to draw a precise line between those cases in which common law would give complete relief and those in which it would be necessary to resort to equity; and the provisions of the Judicature Act (*a*) already referred to have rendered such a distinction comparatively unimportant. Yet the difference of the two principles should be kept in mind here, as elsewhere, and it may be sketched in a few words.

Fraud at law
and in equity.

To constitute fraud at common law, it is not enough to show that fraud in the sense of misrepresentation and undue advantage of the position of the parties said to be imposed upon has been committed, but some act, so to speak, of offensive dishonesty must be brought home to the party charged with it.

In order to understand the attitude of equity in regard to fraud, reference must be made to the exposition of the general principles of equity at the beginning of the book. In dealing with fraud, equity may be observed to appeal to and act on the conscience of the parties, to demand not only a formal compliance with the rules of honesty, but a conscientious consideration (where such is owing) of the interests of other people. It will take into account all the circumstances of the case, not only the act and intention of the party complained of, but the position of the party said to have been imposed upon (*b*). It will interfere not only where actual *deception* has been practised, but also to prevent the dishonest circumvention of one person by another.

It has by many writers been deemed undesirable, if not impossible, to formulate any definition which shall indicate the various forms in which fraud, as it is understood in Courts of equity, may present itself. The forms of fraud are infinite, and (in the words of Lord Hardwicke) were

Definition of
fraud.

(*a*) 36 & 37 Vict. c. 66.

(*b*) *Stewart v. G. W. R. Co.*, 2 Dr. & Sm. 438.

Courts of equity "once to lay down rules how far they " would go, and no farther, in extending their relief " against it, or to define strictly the species or evidence of " it, the jurisdiction would be cramped and perpetually " eluded by new schemes which the fertility of man's invention would contrive" (c).

But though it is doubtless true that the evil which Lord Hardwicke feared might result from an authoritative definition, which purported to indicate the limits which would bind the Court in its interference with inequitable (or *iniquitous*) transactions, it is none the less useful, and it is by no means impossible, to arrive at a definite idea as to the meaning attached in Courts of equity to the term "fraud," and to express the same in clear and simple language. Of course, it will be observed in the first place that Courts of justice are only concerned with fraud in so far as it operates on legal rights. They have no concern with transactions which, however shocking to a moral sense, do not infringe such rights as are recognized by municipal law. Now it is a principle of equity that men should so far respect the legal rights of one another as to be fair and just in their dealings. And equity esteems it neither fair nor just that a man should deprive another of his rights by means of falsehoods respecting the matter in question. It is true that it cannot interfere in every case in which a transaction has been induced by false statements. It must assume men to be reasonably vigilant on the one hand, as it requires them to be fair and just on the other; and no general expression can indicate, or ought to indicate precisely, how far the Court will go in its interference with transactions induced by falsehood. Nevertheless, the first and most important element in what is known as "fraud" is falsehood or deception. But the term "fraud" covers other transactions in which there is not necessarily any falsehood, express or implied, neither

(c) Parke's Hist. of Chanc., p. 508; Story, 186; *Mortlock v. Buller*, 10 Ves. 292, 306.

suggestio falsi nor *suppressio veri*. A man may be tricked out of his rights without any deception operating on his mind and motives; as, for instance, where a man attempts to convey his property to another with intent to defeat the just claims of his creditors, or takes advantage of the necessity of another to make an unconscionable bargain with him. Such circumstances as these are often sufficient to move the Court to grant relief. And under one or other of these heads all dealings properly styled fraudulent may be classed. Fraud then may be taken to mean, the interference with legal rights either by deception or by circumvention (*d*).

This, however, though it serves as a statement of the juristic meaning of the term "fraud," goes but a very little way towards instructing the student as to the extent to which Courts of equity will go in granting relief against fraudulent dealings. This knowledge can only be reached by a consideration of the various classes of cases in which relief has been afforded.

In the leading case of

CHESTERFIELD v. JANSSEN

[2 Ves. Sr. 125; 1 W. & T. L. C. 592]

Lord Hardwicke enumerated the different species of fraud which sufficed to induce the interference of equity to the following effect:—

Lord Hardwicke's classification.

1. Actual fraud or *dolus malus*; fraud arising from facts and circumstances of imposition.
2. Fraud apparent from the intrinsic nature and subject of the bargain itself; a class comprising inequitable and unconscientious bargains generally.
3. Fraud which may be presumed from the circumstances and condition of the parties to the transaction.
4. Fraud which is so considered from circumstances of imposition on other persons not parties to the transaction.

(*d*) See the Law Quarterly Review, Oct. 1887, "Definition of Fraud," by M.M. Bigelow.

5. Fraud which is imputed in cases of catching bargains with heirs, reversioners, or expectants in the life of the fathers, &c.; a class of cases usually compounded of all or several of the other species of fraud, since in them there is generally either actual deception, weakness on one side and extortion on the other, or are unconscionable conditions and some deceit and illusion on other persons not privy to the agreement, such as the father or ancestor.

The last of these divisions is admittedly compounded of the others, and it will simplify the arrangement for our present purpose to treat the cases which would fall within it under the several headings to which they may be respectively referred. Moreover, the third class of frauds here specified seems rather to be a subdivision of the second than a distinct and correlative class. We shall, therefore, take as the second division inequitable and unconscientious transactions generally; of these, some being deemed fraudulent on account of their intrinsic nature or subject-matter; others on account of the peculiar circumstances or condition of the parties.

Again, the fourth class comprises two species of transactions so distinct as to warrant the consideration of each as correlative with the other main divisions. Some transactions are deemed fraudulent as being inconsistent with the general policy of the law; others from their tendency to unfairly compromise the private rights of individuals not parties thereto. These we shall separately consider.

We are accordingly left with four leading divisions, under one or other of which all the various transactions regarded in equity as fraudulent may be classed. It will be observed that this classification does not expressly recognise the distinction often taken between active and constructive fraud. The transactions classed under the latter head will, however, be found fully dealt with under one or the other of the last three divisions. By cases of constructive fraud are meant those in which equity, reviewing the conduct of one or more parties, practically says that if

Division of
the subject.

Constructive
frauds.

their conduct was not dishonest and fraudulent, (in familiar language) *it might just as well have been so* ; that is to say, the suspicious conduct is so like actual fraud that for reasons of public policy it would be unsafe to attempt to draw a judicial distinction between them.

The entire division of the subject will then be as follows :—

- I. Actual fraud (*Dolus Malus*).
 - 1. Arising from wrongful acts.
 - 2. Arising from wrongful omissions.
- II. Inequitable and unconscientious transactions.
 - 1. Fraud presumed from the character or subject-matter of the transactions.
 - 2. Fraud presumed from the circumstances or condition of the parties.
 - (1.) Contracts with persons under duress, lunatics, imbeciles, infants, &c.
 - Contracts between persons in fiduciary relations.
 - (2.) Gifts between parties in unequal positions.
- III. Frauds so considered on grounds of public policy.
 - (1.) As to marriage.
 - (2.) Restraint on trade.
 - (3.) Sale of offices, &c.
- IV. Frauds on the private rights of third persons.
 - (1.) Fraudulent misrepresentations and concealments.
 - (2.) Frauds on powers.

I. *Actual Fraud (Dolus Malus), exhibited in Facts and Circumstances of Imposition.*

Actual fraud is fraud evidenced by some positively dishonest act or omission. Under this head will be dealt with those cases in which an attempt to impose upon the

Actual fraud.
Imposition.

Expressly
proved.

aggrieved party by some wrongful act or omission is expressly proved. We shall distinguish frauds arising from wrongful acts from those arising from wrongful omissions.

1. Actual Fraud consisting in Wrongful Acts.

*Suggestio
falsi.*

The largest class of transactions falling under this head is that in which the fraud consists in active misrepresentation, or *suggestio falsi*.

In the case of

ATTWOOD v. SMALL

[6 Cl. & F. 232, 444]

Rules in
Attwood v.
Small.

Lord Brougham gave expression to three rules respecting the degree of misrepresentation which would justify the rescission of a contract in equity:—

1. The representation must have been contrary to fact.
2. The party making it must have known it to be contrary to fact.
3. It must have given rise to the contract (*dans locum contractui*).

Representa-
tion must be
false.

Expressions
of opinion
distinguished.

The first of these rules needs but little comment, since it is but a bare definition of the most essential element of misrepresentation—its falsity. It is only necessary to point out the distinction between a misrepresentation as to a fact and a mere expression of opinion. A representation which amounts only to a statement of opinion, judgment, probability, or expectation, or is merely a conjectural or exaggerated statement, will generally be deemed immaterial, for a man is not justified in placing reliance on it (*e*). This includes language of puffing or commendation, commonly resorted to by vendors, on which purchasers are not presumed to place reliance (*f*). Sometimes, however, what is in form an

(*e*) Kerr on Fraud, 39; *Haycraft* 562.
v. *Creasy*, 2 East, 92; *Jennings* v. (*f*) *Fenton* v. *Broune*, 14 Ves.
Broughton, 5 De G. M. & G. 126, 144.
134; *Bellairs* v. *Tucker*, 13 Q. B. D.

expression of opinion is, under the circumstances, virtually equivalent to a statement of fact. Thus where a vendor represented that property was let to "a most desirable tenant," well knowing that the rent was not regularly paid, there was held to be a misrepresentation sufficient to avoid the sale (*g*).

The second rule is subject to some exceptions. Thus, though a person may not know his statements to be false, this ignorance will not protect him if he has been guilty of recklessness in stating that to be a fact as to which he had no knowledge (*h*); or if he has been guilty of negligence, and is thus ignorant of that which he would have known if he had rightly discharged his duty (*i*).

It would thus be more strictly accurate to say that a representation false in fact, but which the person making it honestly and upon reasonable grounds believes to be true, will not, independently of a duty cast on him to know the truth, entitle the party misled to impeach the transaction as fraudulent (*k*). Such misrepresentations may indeed give a title to relief on the ground of mistake, as to which see *infra*, p. 193, *et seq.*

Thirdly, the misrepresentation must have given rise to the contract; or, in somewhat more general terms, misrepresentation in order to justify the rescission of a contract must be as to some material fact constituting an inducement or motive to the act or omission of the other party (*l*). This rule excludes cases in which the misrepresentation only extends to some unimportant detail, or to something merely collateral to the contract. And it follows from it, that misrepresentation is of no effect unless it has in fact misled the person complaining of it. If he

Reckless statements, or negligent ignorance.

Representation must on reasonable grounds be believed to be true.

Must be *dans locum contractui*, i. e. of a material fact.

Must have in fact misled the party.

(*g*) *Smith v. Land and House Property Corporation*, 28 Ch. D. 7.

(*h*) *Peek v. Derry*, 37 Ch. D. 541; *Reese River, &c. Co. v. Smith*, L. R. 4 H. L. 64, 79; *Owen v. Homan*, 4 H. L. 997, 1035.

(*i*) *Rawlins v. Wickham*, 3 De G.

& J. 304, 313; *Burrowes v. Lock*, 10 Ves. 470; *Slim v. Croucher*, 1 De G. F. & J. 518, 525.

(*k*) *Merewether v. Shaw*, 2 Cox, 124, 134.

(*l*) *Story*, 195; *Pulsford v. Richards*, 17 Beav. 87, 96.

knows it to be false it cannot have influenced his conduct (*m*). It does not indeed suffice for the defendant to say that the plaintiff had the means of knowledge within his reach, and that by inquiry he might have ascertained the truth; for "no man can complain that another has too implicitly relied on the truth of what he has himself stated" (*n*). If, however, having such means of knowledge, the plaintiff has used them, and having made inquiries he eventually acts on his own judgment, he cannot complain of the misrepresentation (*o*). And if a misrepresentation is capable of several interpretations, it is for the plaintiff to show on which he relied. The court will not assume that he has been deceived merely because under the circumstances he very well might have been (*p*).

The injury must not be a remote consequence thereof.

Notwithstanding, again, that injury arises from misrepresentation, there will be no case for relief if the injury be but a remote consequence of the misrepresentation (*q*).

A misrepresentation by an agent may well suffice to avoid the contract of his principal (*r*). And so, if misrepresentations are made by the directors of a company, there is a remedy, not only against the directors personally, but also against the company, to the extent of any profits which have accrued to it through the fraud (*s*). Though, however, fraudulent directors are jointly and severally liable, so that one or more of them may be sued without the others (*t*), an innocent director is not liable for the fraud of his co-directors, if he is not chargeable with negligence in his duty (*u*).

(*m*) *Nelson v. Stocker*, 4 De G. & J. 458.

(*n*) *Redgrave v. Hurd*, 20 Ch. D. 1; *Reynell v. Sprye*, 1 De G. M. & G. 656, 710; *Central Railway Co., &c. v. Kisch*, 2 L. R. H. L. 99, 120; and see *Edgington v. Fitzmaurice*, 29 Ch. D. 459.

(*o*) *Jennings v. Broughton*, 5 De G. M. & G. 126, 140; *Dyer v. Hargrave*, 10 Ves. 505.

(*p*) *Smith v. Chadwick*, 9 App. C. 187.

(*q*) *Barry v. Crosskey*, 2 J. & H. 1.

(*r*) *Mullens v. Miller*, 22 Ch. D. 194.

(*s*) *Western Bank of Scotland v. Addie*, L. R. 1 Sc. App. 145.

(*t*) *Parker v. Lewis*, 8 Ch. 1035.

(*u*) *Re Derham & Co.*, 25 Ch. D. 752; see also *Peek v. Gurney*, 6 L. R. H. L. 377.

Another class of cases very similar to those considered under the head of misrepresentation is where the fraud consists in what has been called "active concealment"; as where a person uses some contrivance to hide a defect of something offered for sale. In every such contrivance there is fraud (*v*), provided, as in the case of misrepresentation, that the concealment has been of some material fact, and is *dans locum contractui*. Active concealment.

2. Actual fraud arising from wrongful omission.

Under this head fall those cases in which fraud is imputed from the circumstance of a wrongful though passive concealment, or *suppressio veri*. *Suppressio veri.* In certain circumstances silence may be as fraudulent and fatal as falsehood.

The first and third of the rules applied to misrepresentation in *Attwood v. Small* (*x*), apply equally, *mutatis mutandis*, to passive concealment. It must relate to a material fact, and must be instrumental in bringing about the contract.

But there is this further restriction, that silence will not amount to fraud unless the fact suppressed is one which the party concealing it is under some legal or equitable obligation to disclose (*y*).

If parties are dealing at arm's length, either may avail himself of his superior knowledge without being required to disclose it to the other; the vendor may have ascertained some defect, for instance, the unproductiveness of the land of a farm which he is selling; or the purchaser may have information of something which confers on the land exceptional value, such as a mineral deposit under it; but neither is required to communicate such knowledge (*z*). Such cases are very different from those already referred to, in which some actual artifice or contrivance is resorted to to conceal a defect. Fact suppressed must be one in which confidence is reposed.

(*v*) *Hill v. Gray*, 1 Stark. 434.

(*x*) *Sup.*, p. 156.

(*y*) See *Coaks v. Boswell*, 11 App.

C. 232.

(*z*) *Fox v. Mackreth*, 2 Bro. C. C. 420; *Turner v. Harvey*, Jac. 169, 178.

E. g. defects
of title.

But if a vendor conceals a material fact as to which, from the nature of the case, confidence is reposed in him, the transaction may be set aside on the mere ground of his silence. Thus the concealment of an incumbrance on an estate (*a*), or of the death of a person on whom the title depends (*b*), or of other defects of title, will invalidate a transaction.

Patent and
latent defects.

The distinction has been expressed as being between patent defects and latent defects. As to patent defects, or such defects as may be discovered by the exercise of ordinary vigilance, there is no duty to disclose them; each party may be reasonably required to rely on his own judgment. Latent defects, or such as one party has no means of discovering save through the other, must be disclosed.

Specially
protected
contracts.

These rules are generally applicable, but certain contracts are, from their nature, more narrowly protected from the consequences of concealment.

Insurance.

Thus in contracts of insurance (and in marine insurance especially), it is considered that since the insurer necessarily reposes confidence in the insured as to all facts and circumstances which are peculiarly within his own knowledge, not only misrepresentation, but concealment of a material fact which is not a matter of general knowledge, though it may be without fraudulent intention, vitiates the policy; that is, makes it voidable at the underwriter's election (*c*); and the obligation to make full disclosure extends not only to facts actually known to the assured, but to facts which he ought to and with proper diligence would have known (*d*). Apart from express provisions of policies, it seems that the rule is not so strictly applied in cases of life and fire insurance (*e*).

(*a*) *Edwards v. M'Leay*, 2 Swanst. 287.

(*b*) *Ellard v. Llandaff*, 1 Ba. & Be. 241.

(*c*) *Ionides v. Pender*, 9 L. R. Q. B. 531, 537; *Morrison v. Universal, &c. Co.*, 8 L. R. Ex. 197, 205.

(*d*) *Proudfoot v. Montefiore*, 2 L. R. Q. B. 511.

(*e*) *Wheaton v. Hardisty*, 8 E. & B. 232; *Sillem v. Thornton*, 3 E. & B. 868. But see *Thomson v. Weems*, 9 App. C. 671.

In the contract of suretyship, also, the duty of making full disclosure is strictly insisted on (*f*). Suretyship.

On the same principle, in family settlements, in which parties may be expected to deal in a spirit of mutual trust and confidence, full communication must be made; and if it is not, though there may have been no fraudulent motive or intent, the transaction is liable to be set aside (*g*). Family settlements.

Where also a person makes a composition with his creditors he must deal openly and equally with them all. If by misrepresentation or concealment he creates a false impression as to the amount of his property, the transaction cannot be sustained (*h*). Neither is it lawful for the debtor to permit or for any creditor to obtain any secret or undue advantage. Equality between all the creditors is the very basis of composition deeds, and if there is any secret arrangement by which the concurrence of some or one of them is obtained by means of any exceptional concession, or if for any reason preference is shown, such arrangements are utterly void; they cannot be enforced even against the assenting debtor (*i*), and any money paid under them may be recovered back (*k*). Composition deeds.

It must be remembered that in all cases of actual fraud, the defrauded party may lose all right to relief by ratification of the fraudulent act; and this may be effected by continuing to deal with the person who has defrauded him, as well as by a formal release. But it is evident that no acts, however formal, can amount to such a ratification unless the party does them after acquiring full knowledge of the fraud and its natural consequences (*l*). And if the Statute of Limitations is relied on in defence to an action Ratification.

(*f*) See *infra*, pp. 348 *et seq.*

(*g*) *Gordon v. G.*, 3 Swanst. 400, 473, 477; *Fane v. F.*, 20 Eq. 698. See *infra*, p. 199.

(*h*) *Vine v. Mitchell*, 1 Mood. & R. 337; *Exp. Milner*, 15 Q. B. D.

605.

(*i*) *Jackman v. Mitchell*, 13 Ves.

581.

(*k*) *Mare v. Sandford*, 1 Giff. 288.

(*l*) *Vigers v. Pike*, 8 Cl. & F. 562, 630.

based on fraud, the statute is deemed not to have begun to run until the fraud was discovered, or with reasonable diligence might have been so (*m*).

II. *Inequitable and Unconscientious Transactions.*

Sub-division. This is necessarily a very wide and somewhat indeterminate class, which is scarcely susceptible of systematic analysis. We may, however, approach somewhat nearer to this than we should by a mere enumeration of cases, if we separate those transactions in which the chief ground for suspecting the fraud consists in the character or peculiar subject-matter of the bargain in question, from those in which the presumption of fraud arises more especially from the peculiar circumstances or relations of the parties concerned.

1. Where fraud is presumed from the nature of the transaction.

Catching
bargains with
heirs.
Complex
character of
these frauds.

Under this heading, one of the most important classes consists of transactions with expectant heirs and reversioners respecting their future interests. These dealings do, indeed, involve the consideration of fraud on third persons, namely, the parents or predecessors in title of the heirs or reversioners in question; and at the same time a frequent ingredient in the fraud imputed is the suspicion of duress arising from the distress of the vendor, and the consequent unequal position of the parties. For these reasons Lord Hardwicke, as we have seen (*n*), included these bargains in a separate class compounded of the others. Nevertheless, for simplicity's sake, we have preferred rather to treat of them here, in consideration that the leading element of fraud in them is the suspicion attaching to the very nature of the bargains themselves.

(*m*) *Gibbs v. Guild*, 9 Q. B. D. 59.

(*n*) p. 155.

In these cases the question is usually raised as to the effect of inadequacy of price. Now it is well established that in dealings with interests in possession mere inadequacy of price is not, generally speaking, of itself a sufficient ground for setting aside a purchase (*o*). The inadequacy may, indeed, be so gross as to amount to clear evidence of actual fraud, but to this end it must be "so strong, gross, and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it" (*p*).

Effect of
inadequacy of
consideration.

A striking illustration of this is supplied by the case of *Harrison v. Guest* (*q*), where an illiterate, bedridden old man 71 years of age conveyed away without professional advice property of the value of £400 for the consideration of board and lodging during his life. He lived only six weeks afterwards; yet the inadequacy of consideration was not deemed sufficient to warrant the disturbance of the transaction.

Harrison v.
Guest.

But of dealings with reversions and expectancies equity is much more suspicious. Previously to the statute presently to be mentioned, fraud was in these cases commonly presumed from inadequacy of consideration (*r*); and such transactions were frequently set aside on this ground only, without proof of any other ingredients of fraud, such as misrepresentation, undue influence, &c. (*s*). And the fact that the expectant was of a mature age, or well understood the nature and extent of the transaction, was immaterial (*t*). From the fact of a person selling such an interest, the Court presumed that he was under pecuniary pressure; and it was not incumbent on him to prove that it was so. The *onus* was on the purchaser to show that the transaction was just and reasonable (*u*).

Secus as to
reversions
before
31 Vict. c. 4.

(*o*) *Gwynne v. Heaton*, 1 Bro. C. C. 1, 8; *Tennent v. T.*, 2 L. R. H. L. (Sc.) 6.

(*p*) *Gwynne v. Heaton*, *sup.*

(*q*) 6 De G. M. & G. 424.

(*r*) *Peacock v. Evans*, 16 Ves. 512.

(*s*) *Curwyn v. Miller*, 3 P. Wms.

293 n.; *Aylesford v. Morris*, 8 Ch. 484; *Freeman v. Bishop*, Barn. Ch. R. 15; 2 Atk. 39.

(*t*) *Portmore v. Taylor*, 4 Sim. 182; *Bromley v. Smith*, 26 Beav. 644.

(*u*) *Gowland v. De Faria*, 17 Ves. 20; *Lord v. Jeffkins*, 35 Beav. 79.

Under
31 Vict. c. 4.

By the Sales of Reversions Act (*x*), however, it is enacted that “no purchase made *bonâ fide*, and without fraud or unfair dealing, of any reversionary interest in real or personal estate, shall hereafter be opened or set aside merely on ground of undervalue.” This Act came into operation on the 1st of January, 1868; but a series of decisions has clearly shown that it has not affected the jurisdiction of equity in cases of unconscientious purchases of reversions (*y*). In *Tyler v. Yates* (*z*) Lord Hatherley said: “The legislature has not repealed the doctrines of this Court by which protection is thrown around unwary young men in the hands of unscrupulous persons ready to take advantage of their necessities. I conceive the reason why the law as to sales of reversions was altered to be that the doctrines of this Court had been carried to an extravagant length on that subject” (*a*).

The effect of the statute seems to be that in future the inadequacy of consideration must be so gross as to amount to evidence of fraud; but it has been held that the burden of proof is still on the purchaser (*b*), the circumstances of the case still rendering the Court more suspicious respecting such bargains than in case of a sale of an interest in possession.

The Court has applied the same principle to relieve against a grossly usurious loan to a young man without means, where the expectation of the usurer was to obtain payment by extortion from the father or some relation of the defrauded person (*c*).

Neither before nor since the statute has there been or is there any precise rule as to what difference between the real value and the price paid constitutes inadequacy. In Roman law it was considered that anything above half the value was a sufficient price to sustain the transaction; but

(*x*) 31 Vict. c. 4.

(*y*) *Miller v. Cook*, 10 Eq. 641.

(*z*) 11 Eq. 265; 6 Ch. 665.

(*a*) See also *Aylesford v. Morris*,
8 Ch. 484.

(*b*) *O'Rourke v. Bolingbroke*, 2 App.

C. 814.

(*c*) *Nevill v. Snelling*, 15 Ch. D.

679.

in English equity it is a question of which the Court decides on the facts of each case (*d*).

In ascertaining the value of a reversion, the Court is guided by the evidence as to the market-price at the time of the transaction, rather than by the calculations of actuaries (*e*). The question is not affected by facts subsequent to the contract. Whether the reversion falls in unexpectedly soon or is unexpectedly long delayed, though of course greatly affecting its actual value in the result, is not material to the inquiry as to what was an adequate value according to everybody's knowledge at the time (*f*).

Reversions,
how valued.

Where a sale of a reversionary interest takes place by public auction, the nature of the case supplies strong evidence that the market price has been paid (*g*). But care will be taken to ascertain that the auction has been fairly conducted. Thus if the purchaser knows that the vendor is selling under pressure, and without the usual precautions against a sacrifice of the property, it will still be incumbent on him to prove that the price given was a fair one (*h*).

Sale of reversion by
auction.

Post obit bonds, or bonds conditioned for payment of a sum of money on the death of a person from whom the obligor has expectations, are on similar principles regarded with suspicion in equity, and if of an unconscionable character will be suffered only to stand as security for the actual sum lent thereon, with proper interest (*i*). And the same applies to other securities of a kindred nature.

Post obits.

The ingenuity of money-lenders has often led them to disguise usurious loans to expectant heirs under the mask of trading, goods being supplied merely for the purpose of being at once re-sold. Such transactions are, however, within the reach of Courts of equity, and will be set aside

Fraudulent
pretence of
trading.

(*d*) *Baldwin v. Rochford*, 2 Ves. sr. 517, cited; *Nott v. Hill*, 2 Ch. Ca. 121.

(*e*) *Potts v. Curtis*, You. 543; *Wurdle v. Carter*, 7 Sim. 490.

(*f*) *Gowland v. De Faria*, 17 Ves. 20.

(*g*) *Shelly v. Nash*, 3 Madd. 232.

(*h*) *Fox v. Wright*, 6 Madd. 111.

(*i*) *Curling v. Townsend*, 19 Ves. 628; *Benyon v. Fitch*, 35 Beav. 570.

upon payment of what the goods actually produced upon a re-sale, with interest (*k*).

King v. Hamlet.

A leading case in dealings of this kind is *King v. Hamlet* (*l*), where Lord Brougham stated that relief in these cases should be refused if either the father or other person standing *in loco parentis* to the defrauded person was aware of and did not oppose the transaction, or if the person himself so acted upon the bargain as to alter the situation of the other party or of his property, after the pressure which induced it had ceased. But these rules have been questioned by Lord St. Leonards (*m*); and it seems that the acquiescence of a father will have no more effect than to lead more or less strongly, according to the facts of the case, to the inference that a bargain so authorised was fair and innocent (*n*). The repeal of the usury laws does not affect the jurisdiction of the Court in these cases (*o*).

Terms of relief.

In all such cases as we are considering equity proceeds on the maxim that "*He who seeks equity must do equity*," and only grants relief on the terms of the plaintiff paying the sum actually advanced with interest and any sums reasonably expended by the defendant in improvements, and of proper costs (*p*). Only simple interest at 5 per cent. is allowed (*q*), and a defendant will disentitle himself to costs by any improper conduct, such as refusal to accept a full sum in discharge before action brought (*r*).

Confirmation and acquiescence.

Transactions originally impeachable may, moreover, be rendered valid by subsequent confirmation or acquiescence (*s*). But such confirmation or acquiescence is only

(*k*) *Waller v. Dalt*, 1 Ch. Ca. 276; 1 Dick. 8; *Barker v. Fansommer*, 1 Bro. C. C. 149.

(*l*) 2 My. & K. 456; 3 Cl. & F. 218.

(*m*) Sugd. V. & P. p. 316, 11th ed.

(*n*) *Talbot v. Stainforth*, 1 J. & H. 484, 502.

(*o*) *O'Rorke v. Bolingbroke*, 2 App. C. 814; *Aylesford v. Morris*, 8 Ch. 484.

(*p*) *Murray v. Palmer*, 2 S. & L. 474, 490; *Salter v. Bradshaw*, 26 Beav. 161, 165.

(*q*) *Gowland v. De Faria*, 17 Ves. 20; *Miller v. Cook*, 10 Eq. 647.

(*r*) *Benyon v. Fitch*, 35 Beav. 570, 578.

(*s*) *Cole v. Gibbons*, 3 P. Wms. 289; *Sibbering v. Bakarras*, 3 De G. & Sm. 735.

effectual when it has taken place after a complete cessation of the original pressure (*t*), and with a full cognizance of the right to relief (*u*). And a transaction which is not merely voidable, but absolutely void, as were usurious contracts before 17 & 18 Vict. c. 90, and as are marriage brokerage contracts still, cannot be set up by any subsequent confirmation.

Family arrangements do not come within the restrictions respecting dealings with reversionary interests, unless, of course, induced by undue influence of a parent over a child (*x*); nor do settlements made in consideration of natural affection (*y*).

Family arrangements excepted.

2. Fraud presumed from the position of the parties.

The second and larger class of inequitable and unconscientious transactions comprises those in which the chief, or it may be the sole element of fraud, consists in the peculiar circumstances or relations of the parties concerned.

Fraud presumed from the position of the parties.

Under this head we have to deal with two very distinct classes of transactions, namely, contracts and donations or gifts, which, though to some extent subject to the same principles, are sufficiently contrasted to require separate consideration. And, first, of contracts.

Contracts and gifts.

(1.) *Contracts.*

The very foundation of contract is consent or agreement. There can be no true consent or agreement without a capacity to understand the terms of the agreement, and also freedom to accept or to refuse the terms proposed.

Contract requires consent and freedom.

If, then, a person induces another who lacks either this capacity or this freedom, to enter into an apparent contract, however it may be fenced by formal observances, equity will not recognise the transaction; but, deeming it fraudu-

(*t*) *Gowland v. De Faria*, *sup.*

(*u*) *Savery v. King*, 5 H. L. 627; (*x*) *Tweddell v. T.*, T. & R. 1, 13; *inf.* p. 172.

Mitchell v. Homfray, 8 Q. B. D. 587.

(*y*) *Shafto v. Adams*, 4 Giff. 492.

lent, will generally grant relief against it at the suit of the party imposed upon.

Contracts
with lunatics
and idiots ;

i. Thus from their want of a capacity to understand proposals submitted to them, the contracts of idiots and lunatics, and other persons *non compotes mentis*, are generally deemed invalid in Courts of equity. In order to sustain a contract entered into with a lunatic, the person supporting it must be prepared to show the most perfect good faith, and that it was for the benefit of the lunatic. Equity will not interfere where the contract was entered into without knowledge of the incapacity and it is evident that no advantage has been taken of the weaker party (*z*) ; and it will follow the law in sustaining contracts for providing the lunatic with necessaries (*a*). It may be that applying the strict test of jurisprudence such contracts would be equally void with others in which there has been palpable imposition ; but the practical contrast is sufficiently apparent.

with infirm
persons ;

ii. Equity will, moreover, often interfere where the person imposed upon has not suffered from such aberration of mind as amounts to insanity, but has nevertheless, from old age or other infirmity, been so deficient in wit as to be an easy subject of imposition and undue solicitation or influence. The burden of proving fairness of dealing with such people is on him who ventures on it, and if he fails the transaction will be set aside, and any advantage made thereout must be disgorged (*b*).

with drunken
persons ;

iii. Drunkenness will in some cases invalidate a contract entered into during its influence. If, in the first place, a person has designedly contrived to draw another into intoxication for the purpose of imposing upon him while in that state, equity will interfere to prevent the enjoyment of the advantage thus fraudulently conceived. But in the absence of any such premeditated designs, equity

(*z*) *Manby v. Bewicke*, 3 K. & J. 211.
342. (*b*) *Longmate v. Ledger*, 2 Giff.
(*a*) *Nelson v. Duncombe*, 9 Beav. 157, 164.

will only interfere in cases where the drunkenness of one of the parties has been so excessive as to practically deprive him of all reason and understanding. In cases of slighter intoxication it will refuse to interfere either to enforce or to rescind the contract, being equally unwilling to assist the one person who has immorally incapacitated himself, and the other who has immorally taken advantage of the incapacity (c). At law it has been held that a contract made under excessive drunkenness is voidable but not void, and is therefore capable of ratification by the person when sober (d).

iv. In the cases above referred to the absence of the capacity to understand the proposal was the chief ground of interference. The absence of freedom to accept or reject the proposal is of like effect. The general test of what amounts to such duress or undue influence as to invalidate a contract is the question whether the party was or was not a free agent. Though there may not be actual compulsion or duress, if a person is under the influence of extreme terror, or of extreme necessity, and any advantage is taken of his position, equity will grant him relief (e). *A fortiori*, if the person is actually under imprisonment at the time, any dealings with him will be narrowly scrutinised in his favour (f).

with persons
under duress.

v. There is no necessity for discussing at length the contracts of infants in a work especially devoted to the exposition of the distinctive doctrines of equity, the law respecting them being now regulated by the Infants' Relief Act, 1874 (g), which enacts that thenceforth all contracts "entered into by infants for the repayment of " money lent or to be lent, or for goods supplied or to be " supplied (other than contracts for necessities), and all

Infants.

(c) See *Cooke v. Clayworth*, 18 Ves. 12; *Johnson v. Medlicott*, 3 P. Wms. 130, cited note a.

(d) *Matthews v. Baxter*, 8 L. R. Ex. 132.

(e) *Evans v. Llewellyn*, 1 Cox, 333, 340; *Hawes v. Wyatt*, 3 Bro. C. C. 156, 158; *Boyse v. Rossborough*, 6 H. L. 2, 49.

(f) *Roy v. Beaufort*, 2 Atk. 190.

(g) 37 & 38 Vict. c. 62.

“accounts stated with infants shall be absolutely void; provided always that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable” (*h*). “No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age” (*i*).

Where, however, an infant induces persons to deal with him by falsely representing himself as of full age, he is bound in equity by payments made and acts done at his request and on the faith of such representations, and is liable to restore any advantage he has obtained by such representations to the person from whom he has obtained it (*k*). The principle is that an infant shall not take advantage of his own fraud (*l*). But in order to its application, there must have been an actual false representation, not mere dissimulation; and the party must have been in fact deceived (*m*).

Common
sailors.

vi. A somewhat unique exception from the ordinary rules applicable to contracts is made in favour of common sailors. In consideration of their characteristic carelessness and improvidence, equity carefully scrutinises any contracts made with them respecting wages or prize money due to them, and often grants relief when it appears that undue advantage has been taken of them (*n*).

Hitherto the contracts we have been considering have come under review in connexion with the subject of fraud,

(*h*) s. 1.

(*i*) s. 2; but see *Northcote v. Doughty*, 4 C. P. D. 385; *Ditchan v. Worrall*, 5 *ib.* 410.

(*k*) Pollock Contr. 76, 4th ed.

(*l*) *Overton v. Banister*, 3 Ha.

503; *Clarke v. Cobby*, 2 Cox, 173.

(*m*) *Nelson v. Stocker*, 4 De G. & J. 458; *Lemprière v. Lange*, 12 Ch. D. 675.

(*n*) *How v. Wheldon*, 2 Ves. sr. 516.

on account of some absolute incapacity total or partial in one of the parties ; that is to say, an incapacity not due to the existence of any particular relation between the contracting parties. The fraud imputed in these cases has usually been deemed a species of actual fraud (*o*).

vii. But there is another large class of contracts usually esteemed to come under the head of constructive fraud, in which the incapacity which raises the suspicion of fraud is wholly due to a special relation between the parties, such as that of trustee and *cestui que trust*, or solicitor and client. These cases we have fully considered under the head of constructive trusts. All that was there said might with equal appropriateness have been inserted here.

Contracts with persons under fiduciary relations.

Constructive trusts.

It is a good illustration of the interdependence of the various branches of equitable jurisprudence that such a complete class should fall so aptly under two distinct headings. Because of its jurisdiction in, and its jealous scrutiny of all matters tainted with fraud, equity has created, for the purpose of securing even justice, an extensive class of trusts. Or, viewing the same question from the other side, we may say that in devising a remedy for cases of fraud equity has utilised the principle of trusts, which was originally designed for very different purposes.

(2.) *Gifts.*

Our next consideration is that of voluntary gifts or donations which are deemed fraudulent through the presumption of undue influence which is raised by the relations between the donor and donee.

Voluntary gifts.

These, again, might well have been dealt with under the heading of constructive trusts, the principles illustrated by the case of *Fox v. Mackreth* (*p*) being precisely analogous to those which now present themselves. Notwithstanding this, we have preferred to consider these cases under the head of fraud. The very separation of things so similar will perhaps serve a good purpose in

(*o*) Story, 228—243.

(*p*) p. 94.

emphasizing the relation of the various branches of the subject to each other; while any confusion of arrangement will be completely avoided by a careful attention to this explanation, and to the reference made under each head to the other.

What relation
raises the
presumption.

The first subject of inquiry respecting voluntary donations induced by fraud is as to what relationship between the parties will raise a presumption of undue influence.

One of the most frequently cited cases on this subject is

HUGUENIN v. BASELEY.

[14 Ves. 273; 2 W. & T. L. C. 547.]

Here there was a voluntary settlement by a widow upon the defendant, who was a clergyman, and who had been appointed by her as her agent to manage her affairs. On her subsequently marrying, a bill was filed on behalf of herself and her husband praying that the settlement might be set aside, and this relief was granted on the ground that the defendant had exercised undue influence, and abused the confidence reposed in him.

The first question is, what relationship between a donor and donee is within the principle of this case.

i. Parent and child.

Parent and
child.

Donations from a child to a parent have always been jealously regarded in equity, and of course especially so when they take place but a short time after the attainment of majority. They will be set aside if it appears that any advantage has been taken of the parental authority (*q*); but the mere fact of the relationship will not be sufficient ground for interference when the transaction appears to be reasonable and *bonâ fide* (*r*); and *à fortiori* if it is of the nature of a family arrangement, as to which see p. 199.

(*q*) *Cocking v. Pratt*, 1 Ves. sr. 400; *Wright v. Vanderplank*, 2 K. & J. 1; 8 De G. M. & G. 133; *Turner v. Collins*, 7 Ch. 329.

(*r*) *Blackborn v. Edgeley*, 1 P. Wms. 600, 606; *Tendril v. Smith*, 2 Atk. 86.

If there has been undue influence, a volunteer, or a purchaser with notice claiming through the father, is in no better position than the father himself (s).

In this, as in many other cases, a person standing *in loco parentis* is within the same rules as a parent (t). The meaning of the expression *in loco parentis* is sufficiently explained elsewhere (u). *Person in loco parentis.*

ii. Guardian and ward.

A gift from a ward to a guardian is always suspected; and if made immediately on the ward's attaining his majority, it is liable to be set aside upon the presumption of undue influence (x). Even when a considerable time has elapsed before the gift, if undue influence can be proved, the same relief will be given (y). A guardian is not suffered to set up his trouble in the execution of the guardianship as a consideration for such a gift (y). The case against the guardian is strengthened if his accounts have not been closed, and the donation takes place while he still retains the ward's property in his hands (a). *Guardian and ward.*

But where the authority and influence of the guardian have ceased, equity will not set aside a reasonable gift made to him (b).

Following the analogy of the rule which considers persons *in loco parentis* as under the same restrictions as parents, the principle applies as well to a person who has assumed the office and functions of a guardian as to a guardian legally appointed (c). But in the absence of any such special relationship, the fact of infancy (it must be remembered) does not invalidate a gift (d).

iii. Trustee and cestui que trust.

The relationship of trustee and *cestui que trust* is within *Trustee, and*

(s) *Bainbrigge v. Browne*, 18 Ch. D. 188.

(t) *Archer v. Hudson*, 7 Beav. 551.

(u) pp. 76, 475.

(x) *Everitt v. E.*, 10 Eq. 405.

(y) *Hylton v. H.*, 2 Ves. sr. 547, 549.

(a) *Pierse v. Waring*, 1 P. Wms. 121 n.; 2 Ves. sr. 549, cited.

(b) *Hatch v. H.*, 9 Ves. 296.

(c) *Griffin v. De Veulle*, 1 P. Wms. 131 n.; 14 Ves. sr. 279, cited.

(d) *Taylor v. Johnston*, 19 Ch. D. 603.

cestui que trust.

the same doctrine as fully with respect to donations as we have seen that it is with respect to contracts (*e*), and a mortgagee being a trustee for his mortgagor is included (*e*).

iv. Legal adviser and client.

Legal adviser and client.

A solicitor has always been disabled in equity from taking any gifts from his client, pending a suit, or at any time while the relationship subsists, beyond his proper remuneration (*f*); and a counsel has been held to be within the same rule (*g*).

v. Medical adviser and patient.

Doctor and patient.

The relation between a doctor and his patient has been considered sufficient to support a claim for relief against a voluntary gift, on the ground of undue influence (*h*).

vi. Religious advisers.

Priest and penitent.

The above cited case of *Huguenin v. Baseley* (*i*) is sufficient authority to show that a clergyman or other religious adviser is within the principle under consideration.

vii Other relations of confidence.

Fiduciary relations generally.

The jurisdiction of equity in respect of donations under undue influence is by no means confined to cases in which there is some certain and definite relationship such as we have been considering. Any circumstances which give one person the power of exercising pressure on another may suffice to substantiate a claim for equitable relief. In fact, just as the Court has refused to define fraud itself, so it has refused to commit itself to an enumeration or description of the persons within the doctrine now in question (*k*).

Thus a gift from an engaged lady to her suitor is liable to be carefully scrutinised, and to sustain it the gentleman must be prepared to show that it was made without undue

(*e*) pp. 94—105; *Barrett v. Hartley*, 2 Eq. 789.

(*f*) *Tompson v. Judge*, 3 Drew. 306; *Morgan v. Minnett*, 6 Ch. D. 638.

(*g*) *Brown v. Kennedy*, 33 Beav.

133; 4 De G. J. & S. 217.

(*h*) *Dent v. Bennett*, 4 My. & Cr. 269.

(*i*) *Sup.* p. 172. And see *Alleard v. Skinner*, 36 Ch. D. 145.

(*k*) *Dent v. Bennett*, *sup.*

solicitation or pressure (*l*). A professor of spiritualism has also been considered to stand in a position of undue authority with respect to a believer in his art, and a gift made to him has been set aside (*m*). The same rule has been applied in the case of a person claiming the benefit of a settlement from his deceased wife's sister on his going through the form of marriage with her (*n*).

The next question is, what generally amounts to undue influence; and this, again, is a matter in which no formal definition can be drawn. It is decided by the Court in its discretion on the circumstances of each particular case. But there are certain circumstances frequently found in cases of this class which weigh heavily with the Court in the exercise of this discretion, and serve to illustrate the mode of reasoning on which relief is granted.

Thus the absence of any disinterested or professional advice on the side of the plaintiff, especially where there is a confidential relation between the parties, or considerable disparity between their powers of judgment and means of knowledge, gives rise to a strong suspicion of fraud (*o*). So also a fictitious statement of consideration is a material indication of an undue advantage having been taken (*p*). The absence of a power of revocation in a voluntary settlement (*q*), and even the mere improvidence of the transaction (*r*), are of influence in the same direction. But such circumstances as these will not, in the absence of some such relation of confidence as those above enumerated, always dispense with the necessity of the plaintiff's explicitly proving the fact of undue influence (*s*). It at least requires a strong case where no such relation

What is undue influence?

Circumstances favouring the presumption.

Absence of independent advice;

false statement of consideration; absence of power of revocation; improvidence.

(*l*) *Page v. Horne*, 11 Beav. 227; *Corbett v. Brock*, 20 Beav. 524.

(*m*) *Lyon v. Home*, 6 Eq. 655.

(*n*) *Coulson v. Allison*, 2 De G. F. & J. 521.

(*o*) *Rhodes v. Bate*, 1 Ch. 252; *Dent v. Bennett*, 4 My. & Cr. 269, 273.

(*p*) *Hawes v. Wyatt*, 3 Bro. C. C. 156; *Sharp v. Leach*, 31 Beav. 491.

(*q*) *Coutts v. Ackworth*, 8 Eq. 558.

(*r*) *Harvey v. Mount*, 8 Beav. 439.

(*s*) *Hunter v. Atkins*, 3 My. & K. 113; *Toker v. T.*, 31 Beav. 629.

exists to throw upon the donee the burden of proving the innocence of the transaction (*t*).

Duress.

A gift as well as a contract made under circumstances of duress, such as threats of prosecution or other forms of intimidation, will clearly be set aside (*u*).

Fraud prevails against volunteer claiming through the donee.

As a rule, where a gift is tainted with fraud, the transaction cannot be sustained on behalf of a third person claiming through the donee any more than by the donee himself (*x*). But it is otherwise in the case of a *bonâ fide* purchase from the donee without notice of the fraud. A person so acquiring the property having an equal equity with the donor, may, in accordance with the usual principle, shelter himself behind his legal title and possession (*y*).

Undue influence in obtaining wills.

The consideration of undue influence employed in obtaining testamentary benefits is not within the purview of Courts of equity; but it may here be mentioned that a stronger case is required to set aside a will obtained by undue influence than is needed for the avoidance of a gift *inter vivos*. Thus a solicitor who has himself prepared a will may take a legacy therein, unless there is evidence of mistake, or of some misapprehension caused by him (*z*). In the absence of similar evidence a legacy to a Roman Catholic confessor has been sustained (*a*). In the case, however, of a bequest to a medical attendant under somewhat suspicious circumstances, it was said that the onus of proof lay heavily on him to maintain the validity of the will (*b*); and it has been laid down generally that though persuasion is not unlawful, pressure, of whatever character, if so exerted as to overpower the volition without convincing the judgment of the testator, will constitute undue

(*t*) *Beanland v. Bradley*, 2 Sm. & G. 339; *Hoghton v. H.*, 15 Beav. 278, 299.

(*u*) *Evans v. Llewellyn*, 1 Cox, 333, 340; *Bayley v. Williams*, 4 Giff. 638; 1 L. R. H. L. 200; *Henry v. Armstrong*, 18 Ch. D. 668.

(*x*) *Bridgman v. Green*, 2 Ves. sr. 627; *Maitland v. Irving*, 15 Sim.

437.

(*y*) *Blackie v. Clark*, 15 Beav. 595; *Corbet v. Brock*, 20 Beav. 524.

(*z*) *Hindson v. Weatherill*, 5 De G. M. & G. 301.

(*a*) *Parfitt v. Lawless*, 2 P. & M. 462.

(*b*) *Ashwell v. Lomi*, 2 P. & M. 477.

influence, though no force is either used or threatened (*c*). In short, it must be shown that the testator was induced to do what he did not deliberately intend to do. The mere proof that he acted under an unusual or inofficious or immoral motive will not suffice (*d*).

III. *Frauds so considered from their Inconsistency with the Policy of the Law.*

The third species of fraud in our enumeration comprises those cases which fall under the disapprobation of equity on account of their inconsistency with general public policy, or with some artificial policy of the law. Under this head might be appropriately considered almost the whole subject of unlawful agreements; but it will here suffice to deal in detail with those only in which the Courts of equity are particularly concerned.

1. Transactions respecting marriage.

(1.) One important class of cases coming under this head consists of those in which the action of one or more of the parties concerned is discountenanced on account of its mischievous interference with the policy of the law respecting marriage. Fraud relative to marriage.

Marriage is encouraged by the law, and the marriage contract should above all others be the result of full and free consent. Generally speaking, then, transactions which tend to restrain or prevent marriage, or which tend to the deception of one or both of the parties thereto, are treated as against public policy.

Transactions in restraint of marriage are either in the form of conditions attached to voluntary gifts, or of the nature of contracts.

(*c*) *Hall v. H.*, 1 P. & M. 481.
S.

(*d*) *Wingrove v. W.*, 11 P. D. 81.
N

Conditions in restraint of marriage.

Conditions in restraint of marriage were the subject of elaborate argument in the case of *Scott v. Tyler* (e). In considering their effect, it is necessary to advert to certain consequences which spring from the fact that in dispositions of real property the Courts are guided by the principles of common law; whereas in bequests of personalty the rules of ecclesiastical law, derived from the law of Rome, form the basis of our jurisprudence. This distinction alone accounts for the different treatment of certain conditions according to whether they appear in dispositions of real or of personal property.

Condition precedent or subsequent.

The distinction also between conditions precedent and conditions subsequent must be observed. In the former case the estate does not vest in the beneficiary until the condition is complied with. Thus the condition opens the door to a benefit, and is therefore entitled to a favourable construction, and to support if at all reasonable. But a condition subsequent only operates after the estate has vested in the beneficiary; and its effect being thus penal, it is to be strictly construed. The difference in effect of these two cases will best be seen by the aid of the illustration afforded by actual decisions.

Conditions precedent.

First, as to conditions precedent.

In gifts of land.

A condition precedent attached to a voluntary disposition of land is illustrated by cases in which a devise is made, or a portion directed to be raised out of land, on the condition of the beneficiaries marrying only with the consent of certain persons. Such a condition is valid, and no estate vests until it is complied with (f). In this case, moreover, the rules applicable to gifts of personalty are the same (g).

In gifts of personalty.

Conditions subsequent in particular restraint.

In considering conditions subsequent, it is necessary to distinguish between a condition imposing a particular

(e) 2 Bro. C. C. 431; 2 Dick. 712; 2 W. & T. L. C. 115.

(f) *Fry v. Porter*, 1 Ch. Ca. 138; 1 Mod. 300; *Harvey v. Aston*, 1 Atk. 361.

(g) *Scott v. Tyler*, *sup.*; *Younge v. Furze*, 8 De G. M. & G. 756; *Malcolm v. O'Callaghan*, 2 Madd. 349.

restraint and one which would have the effect of restraining marriage generally. Whether the property concerned be real or personal, it is permissible to bestow it subject to a condition subsequent prohibiting marriage with a particular person (*h*), or with a native of a particular country (*i*), or belonging to a particular religious body (*k*); or marriage may be forbidden until the attainment of a reasonable age, which is not restricted to majority (*l*).

Conditions subsequent in general restraint of marriage attached to a gift of personal property are *prima facie* void, and the gift remains unaffected thereby (*m*). In general restraint of gifts of personalty.

But, where the gift is to a woman, and the intention of the donor appears to be not to restrain marriage, but merely in good faith to make a provision for her as long as she remains single, a limitation of personal property until marriage has been sustained (*n*). Limitation over on marriage.

A condition subsequent in general restraint of marriage, attached to a gift of real estate, is, it seems, valid (*o*); *a fortiori* if in this case the intention appears to be to create a provision for a woman until marriage (*p*). In gifts of real estate.

It must be observed that conditions in general restraint of marriage are always valid in gifts to widows, and are indeed matters of every-day occurrence (*q*); and this not only in the case of a bequest by a testator to his own widow, but also in a gift to the widow of another person (*r*). A gift over on the second marriage of a man has also been sustained (*s*). Second marriages not within the rule.

(*h*) *Jervois v. Duke*, 1 Vern. 19.

(*i*) *Perrin v. Lyon*, 9 East, 170.

(*k*) *Duggan v. Kelly*, 10 Ir. Eq. Rep. 295.

(*l*) *Stackpole v. Beaumont*, 3 Ves. 89; *Younge v. Furze*, *sup.*

(*m*) See *Morley v. Rennoldson*, 2 Ha. 570; *Jenner v. Turner*, 16 Ch. D. 185.

(*n*) *Webb v. Grace*, 2 Ph. 701; *Heath v. Lewis*, 3 De G. M. & G. 954.

(*o*) *Harvey v. Aston*, 1 Atk. 380, note.

(*p*) *Jones v. J.*, 1 Q. B. D. 279.

(*q*) *Craven v. Brady*, 4 Eq. 209; 4 Ch. 206.

(*r*) *Charlton v. Coombes*, 11 W. R. 1038; *Newton v. Marsden*, 2 J. & H. 356.

(*s*) *Allen v. Jackson*, 1 Ch. D. 399. For a concise summary of these rules respecting conditions, see Pollock on Contracts, p. 309, 4th ed.

Contracts in restraint of marriage.

(2.) Contracts in restraint of marriage are, on the same principles as conditions to that effect, considered fraudulent and void.

Thus, where a woman gave a bond conditioned to be paid in case she married again, it was on her marriage ordered to be delivered up (*t*).

Contracts to marry,

Similarly, a contract to marry a particular person who is not bound by a corresponding obligation is invalid as opposed to public policy (*u*). A contract by which persons are mutually bound to marry is valid at law (*x*), but will be set aside in equity if it amounts to a fraud upon a parent or person *in loco parentis*, as in *Woodhouse v. Shepley* (*y*), where the father of the lady was known to be opposed to the match, and the suitors clandestinely entered into mutual bonds to marry each other after his death, under a penalty of £600.

frauds on parents, &c.

Marriage brokerage contracts

Transactions also known as marriage brokerage contracts, in which a person undertakes for a stipulated reward to bring about a certain marriage, are void as frauds upon public policy, and as necessarily involving the deception of one of the parties to the marriage or of the parents (*z*). Such contracts being void are incapable of confirmation (*a*), and money paid thereunder may, it seems, be recovered back (*b*).

are void;

so contracts tending to deceive one of the parties.

On the same principle, every contract by which a parent or guardian seeks to obtain any remuneration for promoting or consenting to the marriage of his child or ward is void (*c*). And generally all contracts upon a treaty of marriage which tend to deceive or mislead one of the parties to it or their relatives are deemed fraudulent and void. Thus, a security given by a son without the privity of his parents

(*t*) *Baker v. White*, 2 Vern. 215. 76; *Hall v. Thynne*, 9 Show. P. C. 76.
 (*u*) *Key v. Bradshaw*, 2 Vern. 102.
 (*x*) *Cock v. Richards*, 10 Ves. 429, 392.
 (*y*) 2 Atk. 535.
 (*z*) *Roberts v. R.*, 3 P. Wms. 65, 588; *Hamilton v. Mohun*, *ib.* 652.

to return part of the portion of his wife was held to be invalid (*d*); and where a man, on the treaty for the marriage of his sister, lent her money, in order to increase her apparent portion, and she gave a bond for its repayment, this bond was decreed to be given up (*e*). In such transactions as these, relief will be given, even on the suit of a *particeps criminis*, the public interest causing a departure from the usual rule that a plaintiff in equity must come with clean hands.

(3.) With equal or greater reason, any attempts to effect a separation between a husband and wife through the means of a conditional gift, are discountenanced. If a bequest is made on condition of such a separation, the condition is absolutely void, and the bequest remains unfettered (*f*). In a more recent case, where an annuity was conditioned on a married woman continuing to live apart from her husband, the Court refused to give effect to the condition after a reconciliation had taken place (*g*). Attempts to separate husband and wife.

2. On a somewhat analogous principle, agreements to use influence with a testator in favour of a particular person or object are considered void (*h*). It has recently been decided that the doctrine of estoppel by representation does not so apply as to compel a testator to make good a representation of his intention to confer a benefit by his will (*i*). But an express contract so to do, supported by valuable consideration, might be otherwise treated (*k*). Agreements to influence testators.

3. Another class of transactions void as contravening the policy of the law are contracts in general restraint of trade. This part of the subject does not indeed present for consideration any principles distinctively equitable, the Courts Contracts in restraint of trade.

(*d*) *Turton v. Benson*, 1 P. Wms. 496.

(*e*) *Gale v. Lindo*, 1 Vern. 475.

(*f*) *Tennant v. Brail*, Toth. 141; *Brown v. Peck*, 1 Ed. 140.

(*g*) *Wren v. Bradley*, 2 De G. & Sm. 49.

(*h*) *Debenham v. Ox*, 1 Ves. sr. 276.

(*i*) *Maddison v. Alderson*, 8 App. C. 467, 473.

(*k*) *De Beil v. Thomson*, 3 Beav. 469; 12 Cl. & F. 45; *Loffus v. Maw*, 3 Giff. 592.

of law having long been as jealous as those of equity of any agreement tending to promote monopolies or discourage industry and just competition (*l*). Equity also recognises the same exceptions as prevailed at law, to the effect that special and limited restraints are lawful; for instance, a restraint against carrying on business at a particular place or within a defined area, or with certain specified persons, or for a limited time. In all such cases the Court will judge of the reasonableness or otherwise of the restriction, and support or subvert the contract accordingly. Similarly, a person may sell the secret of a particular process of business and restrain himself from using it in future (*m*).

Agreements
prejudicial to
the adminis-
tration of
government
and justice,
to influence
officers of
State,

4. Another class of transactions which here invites attention comprises those discountenanced on account of their tendency to interfere with the proper administration of government and of justice. Agreements to corrupt or improperly to influence any officer of State, whether executive or judicial, are obviously void; and so suspicious is the law of everything which threatens danger of this kind, that any agreements which have an apparent tendency in that direction are equally held void, though an intention to use unlawful means be disclaimed (*n*).

buying and
selling offices.

Similarly, apart from the provisions of statutes, which are very comprehensive in their extent, agreements for the buying, selling, or procuring of public offices are wholly void as well at law as in equity (*o*).

(*l*) See *Bunn v. Grey*, 4 East, 190; *Mumford v. Gething*, 7 C. B. (N. S.) 305; *Leather Cloth Co. v. Lonsont*, 9 Eq. 345; and the leading authority of *Mitchel v. Reynolds*, 1 P. Wms. 181; 1 Sm. L. C. 406.

(*m*) *Bryson v. Whitehead*, 1 S. & S. 74; *Harms v. Parsons*, 32 Beav.

328. See generally Pollock on Contracts, 310—319, 4th ed.

(*n*) Pollock, Cont. 286—288, 4th ed.; *Egerton v. Brownlow*, 4 H. L. 1—250.

(*o*) *Harrington v. Du Chastel*, 2 Swanst. 159, n.; *Hartwell v. H.*, 4 Ves. 811.

IV. *Frauds on Third Persons.*

The last species of fraud which remains to be considered comprises frauds so considered from their inequitable interference with the private rights of third persons not parties to the fraudulent transaction.

These are of two classes: first, where such third person is deceived by the misrepresentation or concealment of one of the parties to the transaction: secondly, the fraudulent exercise of powers for purposes other than those intended by the donor of the power.

1. *Deception of Third Persons.*

The consideration of this subject brings before us again questions very similar to those dealt with under the first head, or actual fraud; and generally speaking the characteristics of misrepresentation and concealment there exhibited are equally applicable here. There are, however, some important cases touching the particular application of them in the circumstances now under view, to which it behoves us to advert.

Both misrepresentation and concealment may be treated as fraudulent, not only by a party to the transaction who is deceived, but also in some circumstances by third parties who suffer thereby.

As to misrepresentation as affecting third parties, the following rules were laid down by Lord Hatherley in

BARRY v. CROSSKEY

[2 J. & H. 1, 22],

Rules in
Barry v.
Crosskey.

(1.) “*Every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and so acting is injured or damaged—provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss.*”

(2.) “ *The injury must be the immediate and not the remote consequence of the representation thus made* ” (p).

By conceal-
ment.

As to concealment as injuriously affecting third parties, a leading authority is

Savage v.
Foster.

SAVAGE v. FOSTER

[9 Mod. 35; 2 W. & T. L. C. 620],

which decided that *a person knowing his own title, and not giving notice of it to a purchaser, could not be allowed to set it up against the purchaser; and that the coverture of the person was no protection to the transaction.*

In this case a married woman, knowing herself to be tenant in tail of property subject to her mother's life interest, upon the marriage of her half-sister, induced her mother to convey the lands to her for life, with remainder to the intended husband in fee. The husband under this title, and with no notice of the tenancy in tail, sold to a *bonâ fide* purchaser. It was held that the married woman could not set up her title against the purchaser, and that her right was extinguished.

In this case there was active interposition to induce the conveyance; but the same principle has been applied where a person has simply stood by and permitted others to deal with the property in a manner inconsistent with his rights. If, knowing of such a transaction, he does not give the purchaser notice, he cannot afterwards avoid the purchase (q).

Denying in-
cumbrances.

So, if upon inquiry being made, a person denies the existence of an incumbrance, he cannot afterwards set it up against the purchaser (r). But in this case mere silence has been held not sufficient to avoid the incumbrance, unless at least inquiry is made (s). The distinction between this and the case of an owner lying by is plain,

(p) Pollock, Contracts, 517, ed. 4;
Att.-Gen. v. Ray, 9 Ch. 397.

(q) *Hobbs v. Norton*, 1 Vern.
136.

(r) *Ibbotson v. Rhodes*, 2 Vern.
554.

(s) *Osborn v. Lea*, 9 Mod. 96.

since there is nothing inconsistent in the sale of property subject to an incumbrance, and the incumbrancer might have assumed that the transaction was of that character.

Even if a person in ignorance of his rights misleads a purchaser, the purchaser will be relieved against him if the circumstances were such that he ought to have known his rights; as where a father stands by and allows his son to dispose of a fee simple, supposing the fee was in the son, while in fact it was in the father himself, subject to the son's life estate (*t*).

Purchaser misled in ignorance.

The same principle applies to a case in which a person stands by and suffers another to lay out money on his property, supposing it to be his own. At law he could still have asserted his title without making compensation for the improvements; but in equity the person who had so expended money would be entitled to be indemnified either by a pecuniary compensation, or sometimes, as in the case of a lessee under a defective lease, by a confirmation of his title (*u*). The case is strengthened if there is some fiduciary relation, such as that of agency, between the parties (*x*).

Suffering money to be expended in mistake.

But a person spending money by mistake upon the property of another has no equity against the owner, if he was ignorant of the expenditure; except in so far that if it is necessary for the owner himself to seek the assistance of equity with respect to the property, he will be required to do equity by making compensation as a condition of obtaining relief (*y*). And if after notice of an adverse title, a person proceeds to lay out his money, equity will not assist him merely because no active steps have been taken to establish the title (*z*).

The case of *Savage v. Foster* (*a*) shows that coverture Coverture or

(*t*) *Teasdale v. T.*, Sel. Ch. Ca. 59.

(*u*) *Beaufort v. Patrick*, 17 Beav. 60, 75.

(*x*) *Cawdor v. Lewis*, 1 Y. & C. Ex. 427.

(*y*) *Neesom v. Clarkson*, 4 Ha. 97.

(*z*) *Master of Clare Hall v. Harding*, 6 Ha. 273; *Ramsden v. Dyson*, 1 L. R. H. L. 129, 141.

(*a*) *Sup.*

infancy no
excuse.

is no excuse for such instances of fraud as those we are now considering; it is equally well established that infancy affords no better protection (*b*). An infant cannot, it is true, be made answerable in equity any more than at law for a contract which he has made during his minority, on the mere ground that, without any assertion on his part, the other party believed him to be of full age (*c*); but he is never suffered to take advantage of his own wrong (*d*).

2. *Frauds on powers.*

Powers must
be exercised
bonâ fide.

It is an established principle of equity that a donee of a limited power must execute it *bonâ fide* for the end designed. Otherwise the appointment, though good in law, will be held corrupt and void in equity.

The leading case on this subject is

ALEYN v. BELCHIER.

[1 Eden, 132; 1 W. & T. L. C. 415.]

A power of jointuring was executed in favour of a wife, but with an agreement that the wife should only receive a part as an annuity for her own benefit, and that the residue should be applied to the payment of the husband's debts. It was held that this agreement was a fraud upon the power, and the execution was set aside, except so far as related to the annuity.

The appointor must, in exercising such a power, act *with good faith and sincerity, and with an entire and single view to the real purpose and object of the power. He cannot carry into execution any indirect object, or acquire any benefit for himself either directly or indirectly (e). And though the donee of a limited power may validly release it, he may not do so fraudulently any more than he can appoint fraudulently (f).*

(*b*) *Watts v. Cresswell*, 2 Eq. Ca. Ab. 515.

(*c*) *Stikeman v. Dawson*, 1 De G. & Sm. 90.

(*d*) *Clarke v. Cobley*, 2 Cox, 173.

(*e*) *Portland v. Topham*, 11 H. L. 32.

(*f*) *Cunningham v. Thurlow*, 1 R. & M. 436, n.

Such is the general principle ; and it includes cases in which there is not, as well as those in which there is, an antecedent agreement with the appointee to effect purposes not within the scope of the power ; as well cases in which a benefit is sought to be attained for third parties foreign to the power, as those in which the appointor seeks to benefit himself. We may thus illustrate its application by four classes of cases.

(1.) Where there is an antecedent agreement

(i.) For a benefit to the appointor himself.

Antecedent
fraudulent
agreement.

For benefit of
the appointor.

A frequent instance of this is where a father has a power of appointment among children, and he bargains with some of them for some benefit for himself, *e.g.*, the payment of his debts in consideration of the appointment in their favour. Such an appointment is deemed fraudulent and void (*g*). The same was held where the appointor bargained that the appointed fund should be lent to him (*h*), and also where the appointment was exercised in consideration of an agreement for the purchase of other expectant shares belonging to them (*i*).

(ii.) For the benefit of third parties foreign to the power.

Instances of this are where the donee of a power of appointment among children stipulates for a benefit for his or her wife or husband, as in *Carver v. Richards* (*k*) ; or conversely, where a power of jointuring is exercised under a bargain for the benefit of the children. And, of course, a case in which there is not such close relationship between the parties stands on no better ground (*l*).

For the bene-
fit of
strangers.

(2.) Where there is no antecedent agreement,

(i.) and the appointor seeks his own advantage.

Perhaps the most flagrant example of this form of Fraudulent design of

(*g*) *Farmer v. Martin*, 2 Sim. 502 ; *Re Kirwan's Tr.*, 25 Ch. D. 373.

(*h*) *Arnold v. Hardwick*, 7 Sim. 343.

(*i*) *Cunynghame v. Anstruther*, 2 L. R. Sc. & D. 223.

(*k*) 1 De G. F. & J. 548.

(*l*) *Birley v. B.*, 25 Beav. 299. See and distinguish *Re Turner's Settled Estate*, 28 Ch. D. 205.

appointor to
benefit him-
self.

fraudulent appointment is where a father, having a power of raising portions for children, directs a portion to be raised long before it is required, or in favour of a sickly child, with a view to acquiring the money as next of kin of the child on its decease (*m*).

Fraudulent
release.

The case already cited of a fraudulent release may also be referred to in this connexion. There a father released his power as to a part of the fund so as to vest it in himself as representative of a deceased son. The Court, however, refused to give effect to the release (*n*).

But an appointment is not necessarily invalid because the appointee is an infant (*o*), nor because the appointor may derive some benefit from the appointment. If the whole transaction, when looked at together, shows no appearance of *mala fides*, but only an intention to improve the whole subject-matter of the appointment, or to act in a prudent manner for the benefit of the objects of the power, there is no reason why the appointor should not participate in the improvement (*p*). So also an ultimate limitation in favour of the appointor may be unobjectionable (*q*).

In such cases the burden of proving a corrupt purpose is generally on the person who attempts to impeach the transaction (*r*), though the circumstances may be so strong against the appointor, for instance, where one appointment has already been set aside for fraud, that this position will be reversed, and the appointor will be required to show the innocence of his act (*s*).

(ii.) Where the appointor intends benefit for strangers to the power.

Benefiting
strangers.

The intention of the donor of the power in limiting the

(*m*) *Hinchingbroke v. Seymour*, 1 Bro. C. C. 395; *Wellesley v. Mornington*, 2 K. & J. 143.

(*n*) *Cunningham v. Thurlow*, 1 R. & M. 436, n.

(*o*) *Beere v. Hoffmister*, 23 Beav. 101; *Fearon v. Desbrisay*, 14 Beav. 635.

(*p*) *Re Huish's Charity*, 10 Eq. 5; *Roach v. Trood*, 3 Ch. D. 430; *Henty v. Wrey*, 21 Ch. D. 332.

(*q*) *Cooper v. C.*, 5 Ch. 203.

(*r*) *Campbell v. Home*, 1 Y. & C. Ch. 664.

(*s*) *Topham v. Portland*, 5 Ch. 40, 62; *Humphrey v. Olver*, 28 L. J. Ch. 406.

objects thereof must be strictly followed, and that intention extends as well to the persons entitled in default of appointment as to the objects themselves. To allow the appointor to depart from the terms of the power would be to substitute his purpose for that of the donor in the disposition of the donor's property (*t*). Thus, an appointment amongst children is invalidated by a reservation of a benefit for another person, for instance, a husband, though it may never have been communicated to him (*u*). And an attempt to impose upon the appointee a condition not authorised by the power falls within the same principle (*x*). Nor does it make any difference that the settlor himself is the donee of the power; having declared the trusts he must follow them (*y*).

The mere fact that the appointee, soon after the appointment, re-settles the property on other persons, not objects of the power, will not, in the absence of some further evidence of a bargain to that effect, invalidate the appointment. Such re-settlement is quite consistent with perfect good faith in the appointor (*z*).

It is further to be observed that a fraudulent execution of a power will be set aside not only as against the appointor, but also as against persons claiming under him as volunteers, or even as purchasers for valuable consideration, unless they acquire the legal estate without notice of the fraud (*a*). If the purchaser takes the legal estate with notice, or the mere equitable estate even without notice, he cannot sustain his purchase against the persons entitled in default of appointment (*b*). But it seems that where he secures the legal estate, actual notice must be brought home to him; a mere suspicion will not suffice (*c*).

Fraud prevails against volunteers under the donee.

(*t*) *Topham v. Portland*, 1 De G. 357.
J. & S. 517; 11 H. L. 32.

(*u*) *Re Marsden*, 4 Drew. 594.

(*x*) *D'Abbadie v. Bizoin*, 5 I. R. Eq. 205.

(*y*) *Lee v. Fernie*, 1 Beav. 483.

(*z*) *Routledge v. Dorril*, 2 Ves. jr.

(*a*) *Palmer v. Wheeler*, 2 Ba. & Be. 18.

(*b*) *Daubeney v. Cockburn*, 1 Mer. 626.

(*c*) *M'Queen v. Farquhar*, 11 Ves.

467.

Fraudulent
consent.

An appointment is equally invalid where the consent of certain persons is required, and such consent has been obtained by fraud (*d*), or, on the other hand, has been fraudulently given (*e*).

Partial fraud
when wholly
vitiating an
appointment.

(3.) The question often arises, whether a fraudulent arrangement as to part of the property appointed vitiates the appointment *in toto*, or only as to the part to which the fraud extends. In the leading case of *Aleyn v. Belchier* we find an authority for the severance of the appointment, a part being sustained, and only the part intended for a corrupt or illicit purpose being set aside (*f*). In this case the power was one of jointuring, and there was thus only a single lawful object of the power. But in the case of a power of appointment to several objects, an appointment fraudulent in part will usually be wholly set aside (*g*). The distinction seems to be sound and well established. For in the case of a power of jointuring, where there is evidently an intention to exercise the power, there can be no mistake as to the benefit to be received by the donee; but where there are several objects among whom the appointor may select at his discretion, and he appoints improperly, there is no means of ascertaining in what way he would have divided the fund had his intention been innocent (*h*).

The exception to this rule illustrates the principle of this distinction; for we find that where there is evidence by which the Court can distinguish what is attributable to an authorised purpose from what is tainted with fraud, the appointment may be severed, part being sustained, and part set aside (*i*). This is the case where, though the two appointments are contemporaneously made, the proper can be clearly distinguished from the improper transaction (*k*).

(*d*) *Scroggs v. S.*, Amb. 272, 812.

(*e*) *Eland v. Baker*, 29 Beav. 137.

(*f*) See also *Lane v. Page*, Amb.

233.

(*g*) *Daubeny v. Cockburn*, 1 Mer.
626.

(*h*) *Farmer v. Martin*, 2 Sim.

502; *Arnold v. Hardwicke*, 7 Sim.
343.

(*i*) *Topham v. Portland*, 1 De G.
J. & S. 517; 11 H. L. 32.

(*k*) *Rowley v. R.*, Kay, 242.

(4.) The case of an appointor executing an appointment in pursuance of a bargain inconsistent with the terms of the power, and therefore corrupt and invalid, must be distinguished from a case in which the appointees contract with each other to allow some benefit to the appointor. This is frequently the case where a parent has a power to appoint among children, and the children agree to deal with the fund by way of a family arrangement under which the parent is benefited. Such an arrangement will, indeed, be carefully scrutinised (*l*), but if it is found to be *bonâ fide* it will not be disturbed (*m*).

Contracts
between
appointees.

Another distinction which it is important to indicate is that between the intention or purpose and the motive of an appointor. A corrupt purpose, as we have seen, vitiates the appointment; but if the appointment be within the terms of the power, the Court will not advert to circumstances of anger or resentment which may have induced an unequal appointment (*n*).

Motive of
appointment
immaterial.

Formerly, indeed, where a person had a non-exclusive power of appointment among a class, although with unfettered discretion as to the amount of the shares, and he appointed to some of the objects a merely nominal share, the appointment was set aside as being illusory and not *bonâ fide* following the intention of the power. This was done, for instance, where, in appointing a fund of £100,000 amongst a class, the donee gave to one of the class five shillings only (*o*); and it was not necessary that the discrepancy should be so glaring as this. The difficulty, however, of determining the limits of what was illusory and what was not, was very great, and much litigation was occasioned. To avoid the inconveniences which were thus occasioned, the legislature interfered, and

Illusory
appointments.

(*l*) *Agassiz v. Squire*, 18 Beav.
431.
(*m*) *Davis v. Uphill*, 1 Swanst.
129.

(*n*) *Vane v. Dungannon*, 2 S. & L.
118, 130; *Supple v. Lawson*, Amb.
729.
(*o*) *Morgan v. Surman*, 1 Taunt.
289.

1 Will. IV.
c. 46.

by 1 Will. IV. c. 46, it was enacted after the passing of the Act, no appointment made in exercise of any power of appointment amongst several objects should be invalid or impeached in equity on the ground that an unsubstantial, illusory, or nominal share only should be thereby appointed or left to devolve as unappointed.

37 & 38 Vict.
c. 37.

Still there was nothing in the statute authorising an appointor under a non-exclusive power to omit entirely any one of the objects of the power. It was sufficiently absurd that an appointment should have been good if it gave £1000 to A., £1000 to B., and a shilling to C., but bad if the shilling was not given to C.; yet such was the law (*p*). The reasoning was that the gift of the shilling to C. was at least evidence that there had been no oversight in the execution (*q*). But now this distinction has disappeared, and since 37 & 38 Vict. c. 37, the difference between exclusive and non-exclusive powers has ceased to exist, an appointment under a power of the latter kind being no longer invalid on account of the omission of any of the objects.

(*p*) *Bulteel v. Plummer*, 6 Ch. 164.

(*q*) *Re Stone*, 3 I. R. Eq. 621.

CHAPTER III.

MISTAKE AND ACCIDENT.

SECTION I.—MISTAKE.

*Description.*I. *Mistakes of Law.*1. *Generally.*2. *Special circumstances entitling to relief.*II. *Mistakes of Fact.*1. *Fundamental Mistakes.*2. *Unilateral Mistakes as to subject-matter.*3. *Mistakes of expression.**Rectification of instruments.**Defective execution of powers.*

IN distinguishing mistake from accident Story describes the former as “some intentional act, or omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence” (a). This definition serves, as intimated, to distinguish between mistake and accident; but it fails to clearly mark the distinction which must be observed between mistake, pure and simple, and fraud. Mistake, of course, assumes an immense variety of forms and presents innumerable differences in degree; and if it is dangerous to define the forms of fraud lest the definition should be evaded by newly conceived devices, it is difficult to define mistake in such a manner as to indicate when it will and

Mistake
indefinable.

(a) Story, 110.

when it will not legally affect a transaction, because it is impossible to foresee or provide for the infinite variety of forms which it will assume in the accidents of business. And since the meaning of the word is sufficiently clear, and no formula can be framed which shall generalise the legal effects of mistake, little advantage can be gained by attempting a definition.

Classification
of mistakes.

Most of the cases in which questions arise as to the effects of mistake relate to contracts, or dispositions of property. For purposes of classification we may, for the present, consider all such transactions as if they were between two parties only. It is evident, then, that there are three distinct species of mistake which may arise :—

(1.) One of the parties may be directly led into a mistake by an act or omission of the other party ;

(2.) One of the parties may be mistaken apart from any consideration of the conduct of the other ;

(3.) The mistake may be common to both parties.

Misrepresentations distinguished from pure mistake.

The first of these species introduces considerations and principles quite distinct from those which relate to the remaining two. Mistakes thus induced by one of the parties amount to misrepresentations. It depends on a variety of circumstances whether or not they will be regarded as amounting to frauds. These circumstances we have made the subject of investigation under the heading of Fraud (*b*).

Two species of mistakes remain, the examination of which is not complicated by the admixture of the elements of fraud. The importance of the distinction between them will appear when we enter on the consideration of mistakes of fact.

Mistakes of Law and of Fact.

The most familiar classification of mistakes is that which distinguishes between Mistakes of Law and Mistakes of Fact. The contrast between these two classes is sometimes expressed by saying that relief is given against mistakes of

(*b*) pp. 155 *et seq.*

fact, but not against mistakes of law. But this statement is very far indeed from accuracy. On the one hand, there are many circumstances in which relief will be granted against mistakes of law. On the other hand, a mistake of fact does not of itself, even *prima facie*, entitle a person to be relieved from the consequences of his acts.

I. *Mistakes of Law.*

1. The familiar maxim "*Ignorantia juris neminem excusat*" expresses a principle which is necessary to the administration of justice. It has sometimes been stated that its operation is confined to the domain of criminal law (c); but it has long since been held as well in equity as at common law that parties may not, generally speaking, demand the rescission of their bargains or the reversal of their solemn acts on a ground so uncertain and difficult of determination as an alleged ignorance of law (d). *Ignorantia juris, &c.*

The principle expressed by the maxim viewed thus broadly must certainly be assented to. But a close observation at once shows that a general expression in this form is far too vague to admit of being employed as a practical test. It presupposes an accurate knowledge of what is meant by law, and an unfailing power of discerning the precise boundary which distinguishes mistakes of law from mistakes of fact. Furthermore, it omits to take account of many peculiar circumstances which may render its application repugnant to common sense and to the elementary principles of equity. Before we can safely apply the maxim, we must, therefore, first inquire in what sense the term law is here used; and secondly, we must advert to certain special circumstances which are deemed to render a demand for relief both reasonable and equitable. Limitation of the maxim.

(c) *Lansdown v. L.*, Mos. 364; 2 J. & W. 205. (d) *Stewart v. S.*, 6 Cl. & F. 911, 966.

Not appli-
cable to
foreign law.

(1.) The maxim evidently applies only to English law. No one is presumed to know the laws of foreign countries. They are invariably treated as matters of fact, to be proved, like other matters of fact, by evidence. And it is to be observed that the laws of Scotland and of the colonies, are in this, as in other respects, deemed in our Supreme Court of Judicature to be foreign laws (*e*).

Nor to private
statutes.

(2.) Although public statutes are as fully presumed to be known as the general principles of civil and criminal law, this is not the case with respect to private Acts of Parliament. In the absence of notice of these latter, ignorance or disregard of them amounts to a mistake of fact, and may be relieved against (*f*).

Its applica-
tion to private
rights con-
sidered.

(3.) It was said by Lord Westbury in *Cooper v. Phibbs* (*g*), that in the maxim under consideration the word "*jus*" was used in the sense of denoting general law, the ordinary law of the country; but that when the word "*jus*" was used in the sense of denoting a private right, the maxim had no application, private right of ownership being a matter of fact. But this qualification seems to be more apparent than real. Of course, if ignorance of the private rights of another is due to ignorance of the matters of fact which have led to those rights, the mistake is then merely one of fact, and falls outside the present question altogether. But if the facts are known, the legal consequences of those facts are most clearly presumed to be known; for these consequences are matters of general law, and must be included in the maxim if anything is. This is well illustrated in the case of *Puilen v. Ready* (*h*), where a devise was made to a woman upon condition that she should marry with her parent's consent: she married without such consent, whereupon a forfeiture accrued to other parties, who, though cognisant of the marriage with-

(*e*) *Leslie v. Baillie*, 2 Y. & C. Ch. 91; *McCormick v. Garnett*, 5 De G. M. & G. 278.

(*f*) *Earl of Pomfret v. Lord Windsor*, 2 Ves. sr. 472, 480.

(*g*) 2 L. R. H. L. 149, 170.

(*h*) 2 Atk. 587, 591.

out consent, executed an agreement which had the effect of waiving the forfeiture. They sought relief from this agreement, alleging that they were ignorant of the fact that forfeiture had been occasioned by the marriage without consent; but it was refused them on the ground that the forfeiture was a legal consequence of the facts before them, that their mistake was thus one of law, and was not entitled to relief (*i*).

2. Secondly, there are certain special circumstances under which, though the mistake alleged is undeniably one of law, it is deemed both reasonable and equitable to grant relief against it. Special circumstances grounding title to relief.

(1.) It is quite conceivable that the two parties to an agreement may both be labouring under a false impression as to a matter of law, the effect of which would be to make the agreement something entirely different from that which they intended. In such a case there is indeed no contract at all, the mutual agreement being different in substance from that which legally springs from their acts. It can scarcely be supposed that the law would in these circumstances enforce an agreement which was in truth never made by the parties at all. The question here is not whether a mistake of law will avoid a contract, but whether there ever was a contract (*k*). Fundamental mistake.

The case is quite analogous where, an agreement having been made, it is erroneously expressed through a mistake of law. Here again, to refuse relief against the erroneous expression would be to hold the parties to an agreement which they never made (*k*). Mistake in formal expression.

(2.) We have already excluded from the present consideration cases in which erroneous impressions respecting the law have been intentionally produced in the mind of one of the parties by the other. Persons so deceived are Misrepresentation actual fraud.

(*i*) See also *Irnham v. Child*, 1 Bro. C. C. 92; *Bingham v. B.*, 1 Ves. sr. 126. (*k*) See Pollock Contr. ed. 4, 412.

entitled to relief, for in such a case there exists the most conspicuous elements of actual fraud, and equity is ever ready to relieve against fraud, whatever form it may assume (*m*).

Implied
fraud.

But circumstances less strong than active and wilful deception may suffice to evidence such a fraudulent disposition as to warrant the interference of equity for its discomfiture. For instance, if one of the parties to a transaction parts with his property in manifest ignorance of a plain and settled principle of law, the fact of allowing him so to act is often deemed to be sufficient evidence of an unfair advantage having been taken to call for equitable interposition. This has been illustrated by the case of an eldest son of an intestate agreeing, in ignorance of his rights of heirship, to divide the estates with a younger brother (*n*). But here, as before, the true ground of relief is not the fact of a mistake of law, but the fraud which is implied.

Surprise.

(3.) There are cases also in which a formal and solemn act performed in ignorance of a legal right has been reversed on the ground of mere surprise; for instance, where a woman who was entitled to elect, hastily decided in ignorance of her right to an account (*o*). Where the surprise has been common to both the parties to a transaction, there is of course still stronger ground for granting relief. Such cases approach more or less closely to those already mentioned, in which the error goes to the very foundation of the contract (*p*).

Matters of
doubtful
construction.

(4.) The maxim has no application where the alleged ignorance is not that of a well-known rule of law, but that of a matter of law arising upon a doubtful construction of an instrument. In this case relief may be given (*q*). But

(<i>m</i>) <i>Willan v. W.</i> , 16 Ves. 72.	<i>Llewellyn</i> , 2 Bro. C. C. 150; 1 Cox, 333.
(<i>n</i>) <i>Story</i> , 122; <i>Hunt v. Roussimaniere</i> , 1 Peters, Sup. C. U. S. 1, 15, 16.	(<i>p</i>) See <i>Cochrane v. Willis</i> , 1 Ch. 58.
(<i>o</i>) <i>Pusey v. Desbouverie</i> , 3 P. Wms. 315, 321; and <i>Evans v.</i>	(<i>q</i>) <i>Beauchamp v. Winn</i> , 6 L. R. H. L. 223.

where in such circumstances a fair compromise is entered into without any circumstances of fraud or surprise it will not be afterwards disturbed (*r*).

(5.) Especially is this the case where such compromise is of the nature of a family arrangement (*s*). In *Westby v. W.* (*t*), Lord St. Leonards said: "Wherever doubts and disputes have arisen with regard to the rights of different members of the same family, and fair compromises have been entered into to preserve the harmony and affection, or to save the honour of the family, those arrangements have been sustained by this Court; albeit, perhaps, resting on grounds which would not have been considered satisfactory if the transaction had occurred between mere strangers" (*u*). Long course of dealing and acquiescence by the parties concerned may suffice to sustain an arrangement of the nature of a family compromise, where there has been no written contract (*x*).

Family compromises upheld.

But an agreement cannot be sustained, even as a family arrangement, if in the least degree tainted with fraud; there must be full disclosure of all material circumstances known to one of the parties (*y*), and especially so if the parties are not on equal terms, or there is any confidential relation between them (*z*). Nor will a family arrangement be sustained if one of the parties has entered into it under a simple misunderstanding of his interests, respecting which there could be no reasonable doubt (*a*). Of course, such circumstances as threats, or undue influence of any kind, will in these, as in other cases, invalidate an agreement (*b*).

Unless tainted with fraud.

Mistakes of expression in the instrument embodying Mistakes of

(*r*) *Pickering v. P.*, 2 Beav. 56; *Naylor v. Finch*, 1 S. & S. 564; *Miles v. N. Z. & Co.*, 32 Ch. D. 266.

(*s*) *Stapilton v. S.*, 1 Atk. 2.

(*t*) 2 Dr. & W. 503.

(*u*) See *Cory v. C.*, 1 Ves. sr. 19.

(*x*) *Williams v. W.*, 2 Dr. & S.

378; 2 Ch. 294; *Clifton v. Cockburn*, 3 My. & K. 76.

(*y*) *Gordon v. G.*, 3 Swanst. 400.

(*z*) *Pusey v. Desbouverie*, *sup.*

(*a*) *Dunnage v. White*, 1 Swanst. 137.

(*b*) *Ellis v. Barker*, 7 Ch. 104.

expression in
compromises.

Payments by
mistake.

such compromises will be relieved against just as similar mistakes occurring elsewhere (*c*).

(6.) Where money has been voluntarily paid under a mistake of law, a Court of equity will not, as a rule, order its repayment. Thus, where both an executor and a legatee were independently advised by counsel against the claim of the legatee, and the executor divided the estate in accordance with the opinions given, the Court refused to disturb the transaction when it was subsequently discovered that the construction put on the will was wrong (*d*). If, however, under such circumstances there exists a fiduciary relation between the parties, or an equity is raised by the conduct of one of them, relief may be given (*e*); and payment which is *exacted*, such as a toll, is distinguishable (*f*).

Where money has been paid in mistake of law to one of the officers of the Court, such as a trustee in bankruptcy, or a receiver, the Court has ordered its repayment, considering that it should set an example of an honesty higher than it would be justified in all cases in enforcing on the litigants before it (*g*).

With these explanations and limitations, the principle that equity will not relieve against a mistake of law may be safely accepted; and it will have been observed that those cases in which relief is given do not really amount to exceptions from the principle, since *in all of them the relief is grounded, not on the mere fact that there has been a mistake, but on some other fact which is, independently of that, efficacious to call forth the remedial power of equity.*

(*c*) *Ashurst v. Mill*, 7 Ha. 502.

(*d*) *Rogers v. Ingham*, 3 Ch. D. 351; and see *Powell v. Hulkes*, 33 Ch. D. 552.

(*e*) *Rogers v. Ingham*, *sup.* at p. 357; *Davis v. Morier*, 2 Coll. 303.

(*f*) *Hooper v. Corp. of Exeter*, 56 L. J. Q. B. 457.

(*g*) See *Exp. James*, 9 Ch. 509; *Exp. Simmonds*, 16 Q. B. D. 308; *Dixon v. Brown*, 32 Ch. D. 597.

II. *Mistakes of Fact.*

The inquiry as to the effects of mistakes in matters of fact is more complex and important. It must always be borne in mind that those cases, numerous though they are, in which transactions are deemed void or voidable on the ground of mistake, all constitute exceptions to the general rule, which is, that as regards private law, "mistake *as such* has no legal effects at all" (*h*). It will be found that in all cases in which legal effects follow, some other ingredient is present besides the mere fact that one or both of the parties have acted under an erroneous belief. In one large class of cases the effect of the mistake is to prevent any real contract from being formed at all; in these the agreements, though seemingly and formally valid, are in effect void. In another, though a valid agreement has been formed, owing to mistake in its expression, an equity is raised for its rectification, which though it could not be formerly effected in the Courts of common law, was provided for in those of equity. A third and important class comprises cases in which application is made to a special and discretionary jurisdiction of equity, in the exercise of which Courts of equity are particularly careful that their decrees shall not be productive of hardship. This class applies almost exclusively to suits for specific performance; and though the classification of the subject here would be clearly incomplete without reference to it, its full discussion falls more appropriately under the heading of specific performance (*i*).

1. *Fundamental mistakes.*

By fundamental mistakes, we mean those the effect of which is to prevent any real contract from being formed between the parties. Contract requires consensual agree-

Where mistake prevents a contract from being formed.

(*h*) Pollock, *Contracts*, p. 392, 4th ed. (*i*) *q. v.* p. 637, *et seq.*

ment; and if owing to some error on one or on both sides the parties have never had a common intention, it follows that no contract is formed.

Fundamental errors of this description being as efficacious at common law as in equity to prevent an apparent agreement producing the effects of a legal contract, do not require exhaustive exposition here. It suffices to illustrate them from cases which from their nature or their accompaniments have usually fallen under the special notice of equity.

Mistake as to the nature of the transaction.

(1.) First, there may be a fundamental mistake as to the nature of the transaction itself. Mistakes of this description may be peculiar to one, or common to both parties.

Execution of deeds by mistake.

An instance of the former is seen where a person executes a deed or signs an instrument under a mistaken belief as to its contents. Naturally cases of this description usually raise questions of fraud as well as of simple mistake; but it is clear that without fraud such a transaction may even at law be invalidated on the ground of mistake alone (*h*). A strong illustration of this is afforded by a case in which a person executed a mortgage deed under the mistaken belief that it was only a covenant to produce deeds. This mortgage, having been assigned to a purchaser for value without notice, was nevertheless decreed to have been wholly void, and ordered to be delivered up to be cancelled (*i*). In this case had the deed only been voidable for fraud, no relief would have been given as against the *bonâ fide* purchaser for value.

A fortiori, if in such cases both parties are mistaken as to the nature of the deed or writing, the fact of a mere formal signature will not suffice to establish a contract.

Mistake as to person.

(2.) Secondly, one of the parties may be mistaken as to the person of the other party. Such mistakes are almost

(*h*) *Foster v. Mackinnon*, 4 L. R. C. P. 704, 711; *Kennedy v. Green*, 3 My. & K. 699, 717, 718.

(*i*) *Vorley v. Cooke*, 1 Giff. 230; *Hunter v. Walters*, 7 Ch. 75, 88.

necessarily unilateral. It is evident that they are not in all cases fundamental, since in many transactions the personality of the parties is quite immaterial; for instance, where a person sells goods for ready money, or a railway traveller takes a ticket. But in other cases it is of the very essence of the intention of one of the contracting parties to deal with another particular person, and if so, a mistake as to the person will invalidate the agreement (*k*); but it is at least questionable whether the same principle applies to deeds (*l*).

(3.) Thirdly, the error may relate to the subject-matter of the contract. Mistake as to subject-matter.

If a person intends by his contract to acquire one thing, he cannot be required to accept another. If, however, the mistake is as to a specific article, the agreement in English as in Roman law is not void unless there is a complete difference of substance (*m*).

One important class comprised under this heading consists of those cases in which the subject-matter in the contemplation of the parties does not in fact exist at the time of the agreement. Where in these circumstances the mistake is common to both parties, the agreement is void (*n*). If subject-matter not in existence contract is void.

On this principle a contract for the sale of shares in a company is void if, at the time of the agreement, a winding-up petition has been presented of which neither the vendor nor the purchaser knew (*o*). Similarly, a contract for the sale of a life interest after it has in fact, though without the knowledge of the parties, expired, is void (*p*); and likewise a contract for the sale of a freehold interest which is afterwards discovered to be already in the purchaser (*q*).

If in such cases the mistake is confined to one of the parties, the agreement is *prima facie* valid; but it will Not if it is confined to one party.

(*k*) *Boulton v. Jones*, 2 H. & N. 673.
564.

(*l*) *Hunter v. Walters*, *sup.*

(*m*) *Kennedy v. Panama, &c. Mail*
Co., 2 L. R. Q. B. 580.

(*n*) *Couturier v. Hastie*, 5 H. L.

673.

(*o*) *Emmerson's case*, 1 Ch. 433.

(*p*) *Strickland v. Turner*, 7 Ex.

208; *Cochrane v. Willis*, 1 Ch. 58.

(*q*) *Jones v. Clifford*, 3 Ch. D.

779.

usually be found that there is some ingredient of fraud involved which will render it voidable at the option of the mistaken party ; these cases are quite distinguishable from those now under view.

A person who stands by and knowingly suffers another to lay out money on his land under the mistaken belief that it is his own, may be decreed to repay such money ; but if he is unaware of the outlay, or of the mistake, there is no equity against him (*r*).

Mistake as to
quality or
quantity
when ma-
terial.

Again, "a material error as to the kind, quantity, or "quality of a subject-matter which is contracted for by a "generic description may make the agreement void" (*s*).

Here again the agreement is only void in case the error is common to both parties (*t*). If only one is mistaken, it depends on circumstances presently considered whether or not it is voidable at his option (*u*). And the further limitation must be understood, that the difference is such as in the ordinary course of dealing and use of language amounts to a difference of kind.

Remedy as
to void agree-
ments.

Where an agreement is void on the ground of fundamental error, it is open to either party to bring his action in the Chancery Division to have the transaction declared void, to have any deeds or written instruments executed or signed therein set aside or cancelled, and to be relieved from any possible claims in respect thereof. But cases in which such relief is applicable must be distinguished from others in which, though in the documents expressing the contract, the terms are by common mistake inaccurately set out, nevertheless the real contract between the parties is clearly ascertainable. Where this is the case the proper remedy is a rectification of the instrument ; while if under such circumstances the one party only was mistaken, he might, on the conditions presently to be considered, successfully claim rescission of the contract (*x*).

(*r*) *Weller v. Stone*, 33 W. R. 597.
421.

(*s*) Pollock, *Contr.* 433, 4th ed. (*u*) p. 205.

(*t*) *Smith v. Hughes*, 6 L. R. Q. B. 255. (*x*) *Paget v. Marshall*, 28 Ch. D.

2. *Unilateral mistakes as to subject-matter.*

Though a strict regard for our classification would require us here to deal only with cases in which seeming agreements are made void owing to mistake, this is a convenient place to consider certain cases in many respects analogous to them, in which the mistake, though not actually involving fraud, produces a similar effect, and the agreement becomes only voidable at the option of the mistaken party, or perhaps, more strictly speaking, one of the parties is estopped from asserting that it is void. Agreements when voidable owing to mistake.

This, as we have intimated, is often the case when a mistake which, if common to both parties would make the agreement void, is in fact confined to one of them. We have not to consider cases in which there is a distinct element of fraud, these being elsewhere investigated; our inquiry lies on the border line between them, and the cases which have been up to the present occupying our attention. Unilateral mistake,

The circumstance that one of the parties has entered into an agreement under the influence of a mistake of fact has no legal effect unless— to be of effect must be

(i.) The fact is material to the transaction, or in other words, is essential to its character. as to a material fact;

What is or what is not a material or essential fact is a question which scarcely admits of solution in general terms. Perhaps the closest practicable definition is that a fact is said to be material when the formation of the contract is conditional upon its existence; but whatever the general expression employed, the ultimate decision must remain a matter of opinion. It must suffice here to state by way of illustration that defects of title, extensive difference as to the locality of an estate, or as to its extent, will give a claim to a rescission of a contract in equity (*y*).

(ii.) The mistake is not due to the negligence of the mistaken party. not due to negligence;

(*y*) Story, 141; *infra*, pp. 682 *et seq.*

Equity will never encourage negligence; and it accordingly will not grant any relief against a mistake of fact, however material, if it be such that the complainant might have avoided it by the exercise of reasonable diligence. The mere fact, however, that he might possibly have acquired accurate knowledge, is not sufficient to debar him from relief (z).

as to a fact which there is an obligation to disclose.

(iii.) The fact is one which the party who has knowledge of it is under an obligation to disclose.

This excludes facts the means of information as to which are open to both parties; and cases in which each party is presumed to exercise his own skill and judgment, and there is no confidence reposed; and also facts which are in their nature doubtful, and as to the probabilities of which each may be supposed to calculate in his own discretion (a).

It is evident that this qualification almost, if not quite, amounts to the statement that a unilateral mistake is only relieved against when a non-disclosure by the better informed party amounts to fraud (b).

No relief against persons with an equal equity.

In cases arising out of transactions voidable on account of unilateral mistake, it must be remembered that equity will not interfere against a person who has an equal claim to its consideration. In these circumstances it will leave the law to prevail. Thus, no relief will be granted against a *bonâ fide* purchaser for valuable consideration (c).

3. *Mistakes of Expression.*

Mistakes of the kind last mentioned could from their nature only occur in mutual agreements. Those to which we now proceed may be found either in agreements or in voluntary dispositions of property. They occur whenever an agreement or disposition is sought to be embodied in a formal instrument, and the instrument is so framed as not

(z) *Willmott v. Barber*, 15 Ch. D. 96, 106.

(a) *Mortimer v. Capper*, 1 Bro. C. C. 158; 6 Ves. 24.

(b) See *Wright v. Goff*, 22 Beav. 207; *Met. Counties Soc. v. Brown*, 26 Beav. 454.

(c) *Powell v. Price*, 2 P. Wms. 535; *Davies v. D.*, 4 Beav. 54.

to express clearly or truly the intention of the parties or party.

(1.) At common law as well as in equity the simplest cases of this description have long been provided for by established rules of construction, which it suffices here to refer to in general terms. Thus, at law clerical errors and omissions which could be certainly supplied from the context, and all mere grammatical mistakes were remedied (*d*); the context of a doubtful expression might be referred to to ascertain its meaning (*e*), and the general intent was always regarded as prevailing over the particular expression (*f*).

How far law remedies mistakes of expression.

(2.) Both at law and in equity indeed the rule has long been established that oral evidence is not generally admissible to vary a written instrument. But notwithstanding the existence of a written instrument, such evidence might even at law have been adduced to show that there was not in fact any agreement at all (*g*). In equity the general rule has been subjected to certain modifications which require particular notice.

Oral evidence.

For what purposes admissible at law.

Thus, in equity oral evidence is admitted to show that either by accident, mistake, or fraud, a written instrument does not truly express the intention and meaning of the parties (*h*); and if accident or mistake is clearly proved by such evidence, or is admitted by the other side, or is evident from the nature of the case, equity will rectify it (*i*). Where a plaintiff sought to enforce a contract, but claimed for it a wider construction than that of the defendant, which was adopted by the Court, he was allowed to waive the dispute, and the contract was enforced to the extent to which the defendant admitted it (*k*).

In equity.

(*d*) *Doe d. Leach v. Micklem*, 6 East, 486; *Redfern v. Bryning*, 6 Ch. D. 133; *Salt v. Pym*, 28 *ib.* 153.

(*e*) *Browning v. Wright*, 2 B. & P. 13, 26.

(*f*) *Ford v. Beech*, 11 Q. B. 866.

(*g*) *Pym v. Campbell*, 6 E. & B.

370; *Wake v. Harrop*, 6 H. & N. 775.

(*h*) *Murray v. Parker*, 19 Beav. 305, 308.

(*i*) *Davis v. Symonds*, 1 Cox, 402, 404; *Fowler v. F.*, 4 De G. & J. 250.

(*k*) *Preston v. Luek*, 27 Ch. D. 497.

Again, equity has resorted to extrinsic evidence to modify the meaning of general words where there has been reason to suppose that they were not intended to bear their full and natural meaning. For instance, in constructing a release, the general words are always limited to the matter or matters especially within the contemplation of the parties at the time when the release was given (*l*). One of the most important applications of this is seen in cases where a release is executed on the footing of accounts, which are subsequently found to be erroneous (*m*).

Rectification
of settle-
ments.

(3.) Perhaps the most striking illustrations of the jurisdiction of equity to rectify instruments which erroneously express the intention of the parties thereto, are found in cases respecting the rectification of marriage settlements, which cases usually arise when there is a discrepancy between the preliminary articles and the settlement as finally executed.

Rules.

The principal rules which regulate these cases are clearly stated in the leading authority of

LEGG v. GOLDWIRE,

[Ca. temp. Talb. 20; 1 W. & T. L. C. 17],

and are to the following effect:—

(i.) *If both the articles and the settlement were executed before the marriage, and there are discrepancies between them, then the settlement will generally be considered to express the true agreement, and equity will not interfere to make it conform to the articles.*

(ii.) *But if, even in this case, the settlement purports to be in pursuance of the articles, then, if there be a discrepancy, it will be presumed to have arisen from mistake, and equity will interfere to rectify it (n).*

(*l*) *L. & S. W. R. v. Blackmore*,
4 L. R. H. L. 610, 623; *Turner v.*
T., 14 Ch. D. 829.

(*m*) *Miller v. Craig*, 6 Beav. 433;
Gandy v. Macauley, 31 Ch. D. 1.
(*n*) *West v. Errissey*, 1 Bro. P. C.
225.

(iii.) *And further, even though the settlement does not upon the face of it purport to be in pursuance of the articles, extrinsic evidence may be resorted to to show that such was the intention, and that the discrepancy arose from mistake (o).*

(iv.) *If the articles preceded the marriage, and the settlement was executed after the marriage, then equity will in all cases consider that the articles express the true agreement, and will rectify the settlement to make it conform therewith.* The principle in this case is that after the marriage the parties are no longer in the same unfettered position, and that the agreement as expressed when they were free should be regarded as the true one (p).

Generally speaking, in cases coming under the third of these rules, the Court will only interfere on evidence of a mistake common to all parties (q), and the extent of the rectification required must be clearly ascertained and defined by evidence contemporaneous with or anterior to the deed (r). But there are cases in which on proof of a clear mistake of one party only, the Court has taken upon itself to rectify a settlement (s), and it is especially disposed to do so by any unfair or underhand dealing on the part of the husband (t). A settlement has indeed been rectified even against previous articles on the settlor's uncontradicted evidence of mistake (u).

Generally mistake must be common, and well defined and proved.

A disentailing deed, enrolled under the Fines and Recoveries Act, has been rectified on the ground of mistake, notwithstanding the exclusion by s. 47 of that Act of the jurisdiction of Courts of equity in regard to the specific performance of contracts and the supplying of defects in the execution of powers given by the Act (x).

(o) *Bold v. Hutchinson*, 5 De G. M. & G. 558; *Breadalbane v. O'Handos*, 2 My. & Cr. 711, 739.

(p) *Legg v. Goldwire*, *supra*.

(q) *Sells v. S.*, 1 Dr. & Sm. 45; *Rooke v. Kensington*, 2 K. & J. 753, 764; *Fowler v. F.*, 4 De G. & J. 265.

(r) *Bradford v. Romney*, 30 Beav. 431.

(s) *Harbidge v. Wogan*, 5 Ha. 258; *Hanley v. Pearson*, 13 Ch. D. 545.

(t) *Clark v. Girdwood*, 7 Ch. D. 9.

(u) *Smith v. Iliffe*, 20 Eq. 666.

(x) 3 & 4 Will. IV. c. 74; *Hall-Dare v. H.-D.*, 31 Ch. D. 251.

Rectification
of voluntary
deeds.

Courts of equity will not reform a voluntary deed as against the grantor (*y*), nor will they decree a settlement as against purchasers for valuable consideration (including mortgagees) who have had no notice of the articles; but if they have had such notice, a settlement may be decreed against them (*z*).

Rectification
of wills.

(4.) The jurisdiction of equity to rectify mistakes in wills rests on widely different principles. In no case can oral evidence or any evidence *dehors* the will be admitted to vary or control the terms thereof. It is only when a mistake is apparent on the face of the will itself that the Court will interfere; oral evidence may be resorted to to explain a latent ambiguity.

Thus where a residue was directed to be divided between the testator's "two daughters equally," and in fact he had three daughters when the will was made, it was held that the three were entitled to share the property (*a*). A mistake in computing the amount of a legacy has similarly been set right (*b*).

A mere misdescription of a legatee will not defeat a legacy; but if a legacy is given to a person for a particular motive dependent on a supposed character which he has falsely assumed, he will not be suffered to demand his legacy. This was the case where a woman gave a legacy to a man supposing him to be her husband, whereas in fact the marriage was bigamous and void (*c*). *Vice versa*, if a legacy is revoked upon a mistake of facts, for instance, on the supposition that the legatee is dead, equity will grant relief (*d*). But in cases of this description, whether the suit be to set aside or to establish a legacy on the ground of mistake, the Courts proceed with great circumspection.

(*y*) *Phillipson v. Kerry*, 32 Beav. 628.

(*z*) *Davies v. D.*, 4 Beav. 54.

(*a*) *Stebbing v. Walker*, 2 Bro. C. C. 857.

(*b*) *Milner v. M.*, 1 Ves. sr. 106; but see and distinguish *Ward v.*

Wood, 32 Ch. D. 517; *Re Aird's Estate*, 12 Ch. D. 291.

(*c*) *Kennell v. Abbott*, 4 Ves. 808; *Giles v. G.*, 1 Keen, 692.

(*d*) *Campbell v. French*, 3 Ves. 321.

It does not follow that because one motive is expressed or is apparent, that the legacy is intended to depend upon it alone. The testator may be in some degree moved to confer a benefit by an erroneous supposition of relationship between himself and the beneficiary; but nevertheless the primary motive may be a personal love and affection which exist altogether apart from the fact of such relationship; and if this seems to be the case, equity will not, on mere proof that the supposed relationship did not exist, interfere to take away the benefit (*e*). Still less will proof that a testator has formed a false estimate of the character of a person form a ground for interfering with his testamentary dispositions. Equity never assumes to punish moral delinquencies by taking away civil rights (*f*).

(5.) *Defective execution of powers.*

One of the most useful heads of the jurisdiction of equity in relieving against accident and mistake, is its power to interfere in aid of the defective execution of powers. The principles on which it acts in these cases have been thus expressed by an eminent authority: "Whenever a man having power over an estate, whether owner-ship or not, in discharge of moral or natural obligations, shows an intention to execute such power, the Court will operate upon the conscience of the heir (or other person benefiting by the default) to make him perfect this intention" (*g*). It was on the same principle that when a surrender of copyholds to the use of a will was legally requisite in order to an effectual testamentary disposition thereof, the want of such surrender was supplied in equity; but this interference has long been rendered unnecessary by statute (*h*).

(*e*) *Kennell v. Abbott, sup.*; *Box v. Barrett*, 3 Eq. 244.

(*f*) *Giles v. G.*, *sup.*

(*g*) *Chapman v. Gibson*, 3 Bro. C. C. 229, per Lord Alvanley.

(*h*) 55 Geo. III. c. 192, 1 Vict. c. 26.

The investigation of this subject resolves itself into the following inquiries:—

(i.) To what powers the principle applies; (ii.) What defects or mistakes will be relieved against; (iii.) In whose favour equity will so interfere.

To what powers the principle applies.

(i.) **To what powers the principle applies.**

Generally speaking it matters not what is the nature of the power respecting which the assistance of equity is sought. The cases in which it is material are exceptional. Thus powers of sale, of raising portions, of jointuring, of revoking uses, and of appointment generally, are continually the subjects of equitable relief.

Powers of leasing.

Powers of leasing were at one time thought to form an exception to the general rule, but it has long been established that this is not so, and that a defective execution may in this as in other cases be aided (*i*). In certain cases of deviation from the terms of a power of leasing there is a special relief afforded to the intended lessee by statute (*k*), and such relief is available even if the power has been derived under an Act of Parliament.

Powers arising under an Act of Parliament.

But generally speaking powers arising under an Act of Parliament are construed strictly, and a defect in their execution will not be relieved against in equity (*l*).

(ii.) **What defects will be relieved against.**

Intention must be clear,

The first and most essential condition of relief against a defect in the execution of a power is that there shall have been a clear intention on the part of the donee of the power to execute it (*m*).

and conformable to the intention of creator of the power.

Secondly, the granting of relief against a defective execution is always conditional upon the general rule that equity will not assist in defeating the intention of the person creating the power. It will not therefore dispense with any conditions imposed upon its execution which are

(*i*) *Shannon v. Bradstreet*, 1 S. & L. 52; *Dowell v. Dew*, 1 Y. & C. Ch. 345.

(*k*) 12 & 13 Vict. c. 26, 13 & 14 Vict. c. 17.

(*l*) *Roswell's Ca.*, per Hutton, Ro. Abr. 379, fol. 6; *Anon.*, Freem. 224.

(*m*) *Garth v. Townsend*, 7 Eq. 220.

not merely formal. Thus if the consent of any person is required, a power exercised without such consent will not be supported (*n*). And if a given time is prescribed within which the power must be exercised, this direction must be complied with (*o*). Still less will equity assist in setting up a defective execution which amounts to a breach of trust (*p*).

The defects to which assistance of equity is afforded may be described generally as defects of form. The rule is that where an intention to execute the power is manifest, a mere non-compliance with prescribed forms will be remedied (*q*).

Defects of form relieved against.

Perhaps the most conspicuous illustration of the rule is the case in which a power, directed to be exercised by deed only, is in fact executed by will. This is regarded as a merely formal variation, and is relieved against (*r*). But the converse case is different; a power directed to be exercised by will only cannot effectually be exercised by deed; for a deed being an irrevocable instrument, to allow it to be used instead of a will would be to depart in substance from the intention of the donor of the power (*s*).

Substitution of a will for a deed.

Another large class of cases in which relief is afforded comprises those in which there has been an appointing instrument competent on the general principles of equity, but ineffectual at law; as where the donee of a power has covenanted or agreed to execute it (*t*), or has given a written promise to grant an estate, which he can only fulfil by the exercise of a power (*u*). A recital in a deed has been considered a sufficient indication of intention to amount to an equitable execution (*x*).

Equitable appointment.

(*n*) *Lawrenson v. Butler*, 1 S. & L. 13.

(*o*) *Cooper v. Martin*, 3 Ch. 47.

(*p*) *Mortlock v. Buller*, 10 Ves. 292, 317.

(*q*) *Shannon v. Bradstreet*, 1 S. & L. 63; *Fothergill v. F.*, Freem. 256.

(*r*) *Tollet v. T.*, 2 P. Wms. 489; *Sneed v. S.*, Amb. 64.

(*s*) *Reid v. Shergold*, 10 Ves. 370; *Adney v. Field*, Amb. 654.

(*t*) *Fothergill v. F.*, *sup.*; *Mortlock v. Buller*, *sup.*

(*u*) *Campbell v. Leach*, Amb. 740; *London Chartered Bank v. Lempiere*, 4 L. R. P. C. 572.

(*x*) *Wilson v. Piggott*, 2 Ves. jr. 351; *Cunynghame v. Anstruther*, 2 L. R. Sc. & D. 223.

As to number
of witnesses.

Other defects more formal still are *à fortiori* aided; for instance, the presence of less than the prescribed number of witnesses, or an omission to seal an instrument which the donor of the power has directed to be signed and sealed (*y*). But the Wills' Act itself prevents any relief being given in case of non-compliance with its provisions (*z*).

By 22 & 23 Vict. c. 35, s. 12, it is now provided that a deed executed in the presence of and attested by two or more witnesses, shall, so far as respects execution and attestation, be a valid execution of any power of appointment by deed, notwithstanding that the instrument creating the power shall have required some additional or other forms of execution and attestation. This enactment covers many cases in which relief was formerly purely equitable.

Reservations
under powers
of sale.

Where trustees have a common power of sale over land, and they execute it defectively by selling without the timber or with a reservation of the minerals, the Court cannot, apart from authority conferred on it by statute, remedy the defect (*a*). But now, in the case of a reservation of timber, the Court is empowered, by 22 & 23 Vict. c. 35, s. 13, to aid the defect in its discretion, at the purchaser's expense; and by 25 & 26 Vict. c. 108, unless in the instrument creating the power a reservation of minerals is expressly forbidden, no sale, exchange, or partition made in exercise of the power is to be deemed invalid merely on the ground that the power did not expressly authorise such reservation; and hereafter such reservation may be made by trustees and others, including mortgagees, with the sanction of the Court, to be obtained on petition (*b*).

Non-execu-
tion not
relieved
against.

It is clearly settled that the principle which supplies a defect in the execution of a power does not extend to a non-execution. Thus if a person has been prevented from effecting an execution or an attempted execution by any accident such as sudden illness or death, there is no juris-

(*y*) *Wade v. Paget*, 1 Bro. C. C. 363; *Morse v. Martin*, 34 Beav. 500.

(*z*) 1 Vict. c. 26, s. 10.

(*a*) *Cockerell v. Cholmely*, 1 Cl. & F. 60; 1 R. & M. 418.

(*b*) *Re Beaumont*, 12 Eq. 86.

diction whatever to take the property from those entitled in default of appointment (*c*). The only possible exception to this would be a case in which execution was prevented by fraud, the general rule being that equity considers that as done which has been fraudulently prevented from being done. But there does not seem to be any express decision on the point (*d*).

(iii.) **In whose favour equity will interfere.**

It has in many places been observed that equity will not interfere in favour of pure volunteers; and that principle applies here. It requires at least a meritorious consideration to support the claim of the person seeking relief. Relief given to purchasers,

The strongest claim is that of a purchaser, which term includes a mortgagee and a lessee (*e*). Creditors are also entitled to relief (*f*), and charities, which are generally favoured in equity (*g*). In the leading case of *Tollet v. Tollet* (*h*) similar assistance was offered in favour of a wife, child. creditors, charities, wife, child.

wife; a legitimate child is in the same position (*i*); and in these cases it matters not that the claim is made upon a meritorious consideration only, as, for instance, upon a provision made after marriage (*k*); nor is the relief barred by the fact that the wife or child is otherwise provided for (*l*).

But in the absence of some natural or moral obligation on the part of the donee of the power to provide for the person in whose favour the defective execution has been made, no aid will be given (*m*). Thus a husband (*n*), a grandchild (*o*), and collateral relations (*p*) have no title to No relief to husband, grandchild, collaterals.

(*e*) *Tollet v. T.*, 2 P. Wms. 489; *Buckell v. Blenkhorn*, 5 Ha. 131, 141.

(*d*) See *Middleton v. M.*, 1 J. & W. 94.

(*e*) *Fothergill v. F.*, Freem. 256; *Taylor v. Wheeler*, 2 Vern. 564; *Campbell v. Leach*, Amb. 740.

(*f*) *Wilkes v. Holmes*, 9 Mod. 485.

(*g*) *Innes v. Sayer*, 7 Ha. 377.

(*h*) *Sup.*

(*i*) *Sneed v. S.*, Amb. 64.

(*k*) *Hervey v. H.*, 1 Atk. 567.

(*l*) *Ibid.*; *Chapman v. Gibson*, 3 Bro. C. C. 229.

(*m*) *Farwell*, 276.

(*n*) *Moodie v. Reid*, 1 Madd. 516.

(*o*) *Tudor v. Anson*, 2 Ves. sr. 582.

(*p*) *Goodwyn v. G.*, 1 Ves. sr. 228.

Volunteers. relief; and *à fortiori* a volunteer, even though he be the creator of the power himself (*q*), or the donee of the power (*r*).

Or against a person having an equal equity. The interference of equity is also subject to the further condition that it will not be afforded if the person entitled in default of appointment has a claim on the donee equal to that of the person who seeks to have the execution aided (*s*). In other words, as between equal claimants, equity will not interfere. This limitation is chiefly illustrated by cases in which a child has been entitled in default of appointment, and the effect of the appointment would be to leave him totally unprovided for (*t*).

(*q*) *Watts v. Bullas*, 1 P. Wms. 60, note; *Chetwynd v. Morgan*, 31 Ch. D. 596.

(*r*) *Ellison v. E.*, 6 Ves. 656.

(*s*) Farwell, 277.

(*t*) *Chapman v. Gibson*, 3 Bro. C. C. 229; *Morse v. Martin*, 34 Beav. 500.

SECTION II.—ACCIDENT.

Definition.

- I. *Extent of remedy at Law.*
- II. *Characteristics of remedy in Equity.*

Accident, in the sense in which the word is used in Courts of equity, has been defined as comprising “*such unforeseen events, misfortunes, losses, acts, or omissions, as are not the result of any negligence or misconduct in the party*” (u).

Accident
defined.

The distinction between accident and mistake is manifest and important. Mistake has reference to a state of things at the time at which the contract or other transaction in question takes place. Accident refers to some event which occurs subsequently to the transaction. Mistake is essentially subjective; it indicates a mental condition of one or both of the parties concerned. Accident is objective; it relates to facts wholly external to the parties. Mistake affects the quality or character of the transaction itself. Accident introduces some modification in the remedy which would otherwise be available, or gives rise to some particular claim for relief.

Distinguished
from mistake.

The jurisdiction of equity to grant relief in certain cases of accident is of very ancient date. In its inception it only extended to cases in which no adequate relief was attainable in a Court of law. From time to time Courts of law have acquired new powers of granting relief; but in this as in other branches of equity, the jurisdiction having once

Jurisdiction
to relieve
conditional on
defect of legal
remedy.

(u) Story, 78.

arisen was never afterwards affected by the increased powers of the law. The study of equity, therefore, still requires an examination of the jurisdiction as formerly contrasted with that of common law.

I. *Remedy at Law.*

Extent of
remedy at
law.

In the inquiry, then, whether in any particular case of accident, equity had jurisdiction to grant relief, the first question was whether there was an adequate remedy at law. To answer this a brief *résumé* of the legal jurisdiction in cases of accident is required.

Vis major.

1. Courts of law have always recognised the plea of "*vis major*," or "the act of God." These terms are not indeed understood in a wide sense; but only as including "events which *as between the parties, and for the purpose of the matter in hand*, cannot be definitely foreseen or controlled" (x).

Destruction
of subject-
matter of
contract,

Thus where the performance of a contract depends on the existence of a specific thing, and by the accidental destruction of that thing performance becomes impossible, the contract is no longer enforceable at law (y). The law in such a case implies a condition that the contract shall be off if a thing necessary to its performance perishes without default of the contractor.

or non-
existence
thereof.

Similarly a contract for a future specific product is deemed at law to be conditional on such product eventually coming into existence. For instance, a contract to deliver 200 tons of a particular crop of potatoes was held to be *pro tanto* discharged by a failure of the crop to reach that amount (z).

Personal
service.

Thus again, a contract for personal service is deemed to

(x) Pollock, *Contr.* 367, ed. 4.

(y) *Taylor v. Caldwell*, 3 B. & S. 826.

(z) *Howell v. Coupland*, 9 L. R. Q. B. 462; 1 Q. B. D. 258.

be conditioned upon the continuance of the life and health of the contracting party (*a*).

It scarcely need be said that these principles have no application where there is a warranty or express covenant against the loss or destruction of the thing in question. In such cases the destruction being evidently contemplated and expressly provided for, does not fall within the definition of an accident; and we shall observe that in this respect there is no distinction between equity and law.

Warranty and
covenant
distinguished.

2. In many cases the loss or destruction of deeds was remediable at law, evidence being admitted of the loss or destruction and of the contents (*b*). But in the case of bonds the legal remedy was long inadequate, owing to the technical rule that the defendant was entitled to demand that it should be read in open Court: in other words, *profert* and *oyer* of the bond were necessary to its enforcement. Hence an equitable jurisdiction to grant relief in such cases arose, which, as usual, has not been displaced by the amendment of the law in the same direction (*c*).

Loss and
destruction of
deeds.
Bonds.

3. A bill or note which was not negotiable might, it seems, notwithstanding its loss or destruction, have been proved and sued upon at law (*d*); but an acceptor of a negotiable bill or note could not have been compelled to pay it to any one who could not deliver it up (*e*). By 17 & 18 Vict. c. 125, s. 87, it is, however, enacted that “in any action founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the Court or a judge to order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of the Court or judge, or a master, against the claims of any other person upon such negotiable

Bills, notes.

17 & 18 Vict.
c. 125.

(*a*) *Farrow v. Wilson*, 4 L. R. C. P. 744; *Boast v. Firth*, *ibid.* 1.

(*b*) *Whitfield v. Fausset*, 1 Ves. sr. 387, 392.

(*c*) C. L. Proc. Act, 1852, 15 & 16 Vict. c. 76, s. 55.

(*d*) *Charnley v. Grundy*, 14 C. B. 608, 614; *Wain v. Bailey*, 10 Ad. & E. 616.

(*e*) *Hansard v. Robinson*, 7 B. & C. 90; *Ramuz v. Crowe*, 1 Ex. 167.

“instrument” (*e*). But this extension of the legal remedy did not, of course, affect the equitable jurisdiction which had before arisen.

II. *Remedy in Equity.*

These few illustrations will perhaps suffice to indicate, as far as our present purpose requires, the extent and character of the legal jurisdiction to grant relief in cases of accident. From them we may ascertain whether or not the first condition of equitable relief, namely, the inadequacy of the legal remedy, is complied with.

Second
condition is
conscientious
title to relief.

There is a second condition, equally important; namely, that the party seeking relief must show a conscientious title thereto.

Effect of
negligence or
misconduct.
Equities
equal.

If, therefore, the party seeking relief has been guilty of gross negligence, or of other misconduct in the transaction, he cannot successfully appeal to equity (*f*). Or if both parties stand upon an equal footing in equity, in accordance with the common maxim, equity will not interfere with their legal position. Thus no relief will be given against an heir-at-law where accident has prevented the making of a will, or the will has been imperfect (*g*). And, generally, against a *bonâ fide* purchaser for value without notice, a Court of equity will not interfere on the ground of accident (*h*).

Matters of
positive
contract.

On similar grounds equity will not relieve against accident in matters of positive contract, where the possibility of the accident may fairly be considered to have been within the contemplation of the contracting parties. Thus a lessee who covenants to pay rent, or to keep the

(*e*) And see now 45 & 46 Vict. c. 61, ss. 69, 70.

(*f*) *Exp. Greenway*, 6 Ves. 812.

(*g*) *Whitton v. Russell*, 1 Atk. 448; 1 Mad. 46; Story, 106.

(*h*) *Malden v. Merrill*, 2 Atk. 8; Story, 108.

demised premises in repair during a given term, will remain bound by his covenants as well in equity as at law, notwithstanding an accidental destruction of the premises; for such express contracts indicate an intention to secure the lessor against the consequences of accident; or at least it may be said that the lessee has been guilty of negligence in not protecting himself, by requiring exceptions from the general liability which he has deliberately undertaken (i).

Bearing in mind these two leading principles on which the equitable jurisdiction in matters of accident rests, we are now prepared to notice in greater detail some particular instances of its application.

1. We have already briefly observed the nature and limits of the jurisdiction of Courts of law in the case of lost deeds and other instruments. We shall now investigate that of equity as dealing with the same class of cases.

Equitable interposition is very common and very beneficial in the case of lost bonds. Not only was there claim to relief on the ground that originally the Courts of law refused to dispense with the *profert* and *oyer* of the bond, but there was the further ground that Courts of equity alone had the power of imposing just conditions on the party seeking relief. The maxim, "He who seeks equity " must do equity," is conspicuously applicable to such cases; and equity gives effect to it by requiring a plaintiff who seeks to enforce a bond while alleging its loss, to give a suitable bond of indemnity (k). The procedure of equity also had the advantage of enabling it to require the plaintiff to maintain the fact of the alleged loss by affidavit (l).

Relief in equity on lost bonds.

Indemnity.

Proof of loss on oath.

There was formerly a distinction between the position of a plaintiff merely seeking discovery and that of one who

Former distinction between suit

(i) *Bullock v. Dommitt*, 6 T. R. 650; *Pym v. Blackburn*, 3 Ves. 34, 38; Story, 101.

(k) *Exp. Greenway, sup.*; *E. I. Company v. Boddam*, 9 Ves. 464.

(l) *Exp. Greenway, sup.*

for discovery and for relief. at the same time asked for relief. Where the plaintiff asked only for discovery equity would make a decree without any affidavit of loss or offer of indemnity (*m*), the ground of the distinction being that in suits for discovery the interference of equity was merely auxiliary, and did not interfere at all with the original jurisdiction of the Courts of law. Under the new procedure, however, the reason of the distinction has disappeared, and now in any case an affidavit is required (*n*).

Lost title deeds. 2. Another illustration of the superiority of the relief afforded by equity is supplied by those cases in which a title deed of land has been destroyed or concealed, and the suffering party does not know which alternative is correct. In such a case equity can decree possession of the land to the plaintiff until the defendant shall either produce the deed or admit its destruction (*o*). Courts of law having had no power to put a defendant upon such terms, could afford no adequate relief in such a case. On similar principles a plaintiff in possession might have had his possession established under a lost deed in a suit for discovery (*p*).

Lost negotiable instruments. 3. In the case of lost negotiable instruments, as in that of lost bonds, a Court of equity was the proper forum in which to seek relief, because of its power to provide for an adequate indemnity to protect the defendant (*q*).

Non-negotiable instruments. In the case of a non-negotiable instrument, whatever doubt there may be as to the former jurisdiction at law to entertain a suit thereon, such an instrument having been assignable in equity, an indemnity might be reasonably demanded, and hence there is clearly an equitable jurisdiction to grant relief.

Contracts of personal service. 4. We have observed that contracts of personal service were at law deemed to be conditioned on the life and health of the contracting parties. In equity this principle

(*m*) *Dormer v. Fortescue*, 3 Atk. 132; *Walmsley v. Child*, 1 Ves. sr. 344.

(*n*) Jud. Act, 1873, Order XXXI.
(*o*) *Whitfield v. Fausset*, 1 Ves.

sr. 392.

(*p*) *Dormer v. Fortescue*, *sup.*

(*q*) *Hansard v. Robinson*, 7 B. & C. 90; *Glynn v. B. of England*, 2 ib. 38.

is carried further. Thus where an apprentice paid a premium in consideration of receiving instruction for a certain time, and before the expiration thereof the master became bankrupt, equity apportioned the premium and decreed repayment of that for which, owing to the bankruptcy, the consideration had failed (*r*). This principle has since been embodied in the Bankruptcy Act (*s*).

5. Other cases of accident fall still more peculiarly within the cognisance of Courts of equity. Thus if an executor or administrator pays the debts and legacies of his testator or intestate in full, in confidence that the assets are sufficient, but it is eventually found that from some accident or unforeseen occurrence they are deficient, equity alone can relieve; and it will do so where the deficiency has resulted from an innocent accident or mistake (*t*).

Payments by executors, &c.

and accidental loss of testator's property.

Instances of this kind are supplied by cases in which the goods of the testator have been stolen without any negligence on the part of his executor (*u*), or have been destroyed, or damaged by fire, or otherwise (*x*); and also by cases in which an executor has reckoned as an asset a debt which he supposed to be still due, but which proves in fact to have been paid to the testator (*y*). Equity will not, however, protect executors who make payments on a wrong principle of law. If they take it upon themselves to construe an obscure will, for instance, they do so at their peril (*z*).

6. If, again, an annuity given by a will is secured by public stock which is afterwards reduced by Parliament (*a*), or becomes unproductive owing to a revolution (*b*), equity will grant relief as against the residuary legatees on the ground of accident.

Annuities accidentally reduced.

(*r*) *Hale v. Webb*, 2 Bro. C. C. 78.

(*s*) See 46 & 47 Vict. c. 52, s. 41, *inf.* p. 511.

(*t*) *Edwards v. Freeman*, 2 P. Wms. 447; *Hawkins v. Day*, Amb. 160.

(*u*) *Jones v. Lewis*, 2 Ves. sr. 240.

(*x*) *Clough v. Bond*, 3 My. & Cr.

490, 496; *Job v. J.*, 6 Ch. D. 562.

(*y*) *Pooley v. Ray*, 1 P. Wms. 355.

(*z*) *Halhard v. Fulford*, 4 Ch. D.

389.

(*a*) *Davies v. Wattier*, 1 S. & S.

463.

(*b*) *Hatchett v. Pattie*, 6 Madd. 4.

CHAPTER IV.

RELIEF AGAINST PENALTIES AND FORFEITURES.

*Principle of granting relief.*Peachy *v.* Somerset.Sloman *v.* Walter.I. *Relief when given.*II. *Limits of the principle.*

RELIEF against penalties and forfeitures was originally obtainable exclusively in equity, and this having been so, its jurisdiction remains, notwithstanding that its principles have from time to time been embodied in statutes, and thus become operative in Courts of Common Law; and whatever distinctions between the two jurisdictions continued up to the passing of the Judicature Act, 1873, have by that statute been rendered unimportant.

There are two leading authorities on the doctrine of relief against penalties and forfeitures. In

PEACHY v. THE DUKE OF SOMERSET,

[1 Strange, 447; 2 W. & T. L. C. 1100,]

a person having incurred a forfeiture of a copyhold by making leases contrary to the custom of the manor, and by felling timber, digging stones, and grubbing up hedges, although he offered by his bill to make a recompense, was held not entitled to relief in equity. It was expressed that the true ground of relief against penalties was from

the original intent of the case ; if the penalty was designed only to secure money, then on pecuniary recompense being given the Court would grant relief. But in

SLOMAN v. WALTER

[1 Bro. C. C. 418 ; 2 W. & T. L. C. 1112]

a somewhat wider view was taken ; and the rule was laid down that “where a penalty is inserted merely to secure “the enjoyment of a collateral object, the enjoyment of “the object is considered as the principal intent of the “deed, and the penalty only as occasional, and therefore “only to secure the damage really incurred.” So that whenever this is the case, even though the object of the penalty may be something more than to secure a payment of money, equity is wont to decree compensation in lieu thereof, to the extent of the damage really sustained.

The test question therefore becomes, whether compensation can effectually be made. Penalties to secure payments of money are doubtless the simplest cases, since in them payment with interest is a complete compensation. But there are other cases in which damages for a non-compliance with a condition to perform some collateral act may be assessed with sufficient accuracy to render compensation equitable, and thus to avoid the extreme consequences of forfeiture.

Relief not now confined to penalties to secure money payments.

We shall first illustrate the operation of the principle by referring to those classes of cases in which it is most frequently applied ; and secondly, shall indicate the limits of the principle by referring to certain cases in which it has not been considered applicable.

I. *Relief, when given.*

Bonds.

1. Among the most frequent cases in which in the early times of English equity this jurisdiction was exercised, were the cases of common bonds, in which the payment of a given sum and interest was secured by a conditional penalty of double the amount, or some other excessive sum. Relief in such cases was continually given in equity on the terms of paying the principal, interest, and costs, until the statutes 8 & 9 Will. III. c. 11, and 4 & 5 Anne, c. 16, rendered applications to equity for this purpose no longer necessary.

8 & 9
Will. III.
c. 11; 4 & 5
Anne, c. 16.

Covenants to pay.

The same principle naturally applies where a penalty is inserted in any deed to secure a payment of money, for instance, purchase-money (*a*). And relief in cases of this description is now provided for by the Common Law Procedure Act, 1860 (*b*), which permits payment into Court to be pleaded by leave of the Court or a judge in any action on any bond which has a condition to make void the same upon payment of a lesser sum at a day or place certain (*c*).

C. L. P. Act,
1860.

Interest in mortgages.

2. Relief is, as we shall elsewhere observe, also given when the penalty takes the form of requiring a higher rate of interest in case the principal or interest of a mortgage debt shall not be paid at the stated time or times (*d*); but if the agreement is that on condition of punctual payment a lower rate of interest shall be payable, then on breach of this condition the higher rate may be insisted on, and there is no equity to interfere with the claim (*e*). The cases where, in the happening of a certain event, it is independently agreed that a higher rate of interest is to be paid are distinguishable (*f*).

(*a*) *Exp. Hulse*, 8 Ch. 1022.

(*b*) 23 & 24 Vict. c. 126.

(*c*) s. 25.

(*d*) *Stanhope v. Manners*, 2 Ed. 199, *infra*, p. 239.

(*e*) *Nicholls v. Maynard*, 3 Atk. 519.

(*f*) *General Credit, &c. Co. v. Glegg*, 22 Ch. D. 549; *Herbert v. Salisbury, &c. Rail. Co.*, 2 Eq. 221.

In short, it may be regarded as a principle of universal application that where the payment of a smaller sum is secured by a larger, the larger sum will be regarded as a penalty, the enforcement of which will be relieved against (*g*).

3. Where in a lease there was a clause of forfeiture for non-payment of rent at a stated time, equity always held that the right of entry was only intended as a security for the rent, and continually relieved against it on the lessee's paying the arrears of rent accrued due with interest thereon. This principle has now long been recognised by statute, but its application has been thereby limited to cases in which relief is sought within six months after execution (*h*).

Forfeiture for non-payment of rent.

4. Similarly, relief is continually given against the forfeiture of a mortgaged estate by default of payment at the time named in the deed; the mortgagor having nevertheless an equity to redeem on payment of the principal, interest and costs.

Mortgages.

5. The case of *Sloman v. Walter* (*i*) affords another illustration of relief against a pecuniary penalty to secure a collateral act. There the condition of the penalty was that the defendant should have the use of a particular room in a house whenever he thought proper; on his seeking to recover the penalty, he was restrained by injunction on the bill of the plaintiff, pending the decision of an issue to ascertain the actual amount of damage sustained. In a similar case, a bond with a penalty of £600 not to carry on business save as therein specified within a given area, was relieved against, and actual damages only awarded (*j*).

Penalties to secure collateral acts.

6. Apart from legislation, Courts of equity had no power to relieve against forfeiture for breach of a covenant

Covenants to insure.

(*g*) *Astley v. Weldon*, 2 B. & P. 350—355; *Re Newman*, 4 Ch. D. 724.

Vict. c. 59.

(*i*) *Supra*, p. 225.

(*j*) *Hardy v. Martin*, 1 Bro. C. C.

(*h*) 4 Geo. II. c. 28; 15 & 16 Vict. c. 76, ss. 210, 211; 30 & 31

419, n.

22 & 23 Vict.
c. 35, s. 4.

to insure, on the ground that the risk occasioned was of such a nature as to be incapable of estimation in damages (*k*). But owing to the hardship often occasioned by the strict interpretation of such covenants, it was enacted (*l*) that "a Court of equity shall have power to relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire, where no loss or damage by fire has happened, and the breach has in the opinion of the Court been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of the application to the Court, in conformity with the covenant to insure, upon such terms as to the Court may seem fit" (*m*). By s. 6 it is provided that the Court shall only have power to relieve the same person once in respect of the same condition (*n*). Similar power was conferred on Courts of common law by 23 & 24 Vict. c. 126, ss. 2, 3. These cases are now included in the more comprehensive measure recently passed; see p. 233.

One sum
securing
several acts,
when re-
garded as
penalty.

7. Where a sum of money is stated to be payable upon breach of all or any or one of a number of stipulations, and it is evident that some of them involve serious damage, while others are of trifling importance, then it will be presumed that the parties intended the sum to be subject to modification, and the contract will be treated as giving rise to a claim for damages only (*o*). This is most obviously the case when one of the stipulations is for the payment of a sum of money of less amount than the penal sum named. Such a case is well illustrated by *Kemble v. Farren* (*p*), where the contract was that the defendant should act at Covent Garden Theatre for four seasons receiving £3:6s. 8d. for every night the theatre was open. There was a proviso that if *either party* should neglect or

Kemble v.
Farren.

(*k*) *Green v. Bridges*, 4 Sim. 96.

(*l*) 22 & 23 Vict. c. 35.

(*m*) s. 4.

(*n*) See *Page v. Bennet*, 2 Giff.

117.

(*o*) *Elphinstone v. Monkland Iron, &c. Co.*, 11 App. C. 332.

(*p*) 6 Bing. 141; *Astley v. Weldon*, 2 B. & P. 346.

refuse to fulfil the said agreement or any part thereof, such party should pay to the other the sum of £1,000, and it was agreed that this sum should be considered as liquidated damages, and not as in the nature of a penalty. Nevertheless, on a breach of the agreement in the second season, the Court held that this sum was a penalty, since there was no attempt at proportioning it to the extent of the breach.

It will be seen from the cases that though the Court will by no means disregard the expressed intention of the parties, it is not bound by the mere fact that they have formally agreed that the sum named shall be considered as liquidated damages at all events, and not as a penalty.

The case of *Kemble v. Farren* has indeed often been cited as establishing the wider proposition, that where a contract contains a variety of stipulations of different degrees of importance, and one large sum is stated at the end to be paid on breach of performance of any of them, this must be considered as a penalty, and this without qualification as to the nature of the stipulations themselves (*q*). But after a complete review of all the authorities, the proposition was limited as above by all the judges of the Court of Appeal in *Wallis v. Smith* (*r*), which case shows that the tendency of the Court is now not to interfere with any clearly expressed intention of the parties.

*Wallis v.
Smith.*

8. Another illustration is afforded by those cases in which the Courts have refused to enforce a bye-law of a railway company to the effect that a passenger who travels without a ticket beyond the distance for which his ticket is issued must pay the whole fare from the place from which the train started (*s*). The principle resembles that of *Kemble v. Farren* (*t*), it being considered that the same

(*q*) See *dicta* of Lord Coleridge, C. J., in *Magee v. Lavell*, 9 L. R. C. P. 107, 111, and James, L. J., in *Re Newman*, 4 Ch. D. 724, 731.

(*r*) 21 Ch. D. 243, 264, 271, 276.

(*s*) *Brown v. G. E. R. Co.*, 2 Q. B. D. 406.

(*t*) *Sup.*

sum cannot be reasonably demanded as damages for breaches of contract differing in degree.

Accident,
surprise, or
fraud.

9. In cases in which relief might not otherwise have been given, if there have been any unavoidable accident, surprise, excusable ignorance, or fraud, which has prevented the execution of a covenant, the Court will interfere upon compensation being made (*u*). Under such circumstances as these, relief has been given against a forfeiture of a breach of a covenant to repair (*x*); and similarly where the act of forfeiture has been committed in reliance on the assurances of an agent of the defendant (*y*), and where the right to claim forfeiture has been waived (*z*).

II. *Limits of the Principle.*

Compensation
must be ascer-
tainable.

1. It being a condition of granting relief against a penalty or forfeiture that proper compensation for the breach of the agreement shall be made, it follows that where there are no means of ascertaining what amount of compensation would be equitable, no relief will be given.

Covenant to
repair;

Thus in the case of a breach of a general covenant to repair, by which a forfeiture has been incurred, equity has hitherto usually refused to interfere (*a*). The case of a covenant not in general terms, but to lay out a specific sum in a given time, has been sometimes distinguished (*b*); but it seems that even in such cases relief would only have been given under special circumstances (*c*). On similar grounds relief has been refused in case of a breach of a covenant to build houses (*d*), and of a covenant to cultivate

to build, &c.

(*u*) *Eaton v. Lyon*, 3 Ves. 690, 648.

693; *Hill v. Barclay*, 18 Ves. 56, 62.

(*a*) *Gregory v. Wilson*, 9 Ha. 683, 689.

(*x*) *Hughes v. Met. R. Co.*, 1 C. P. D. 120; 2 App. C. 439.

(*b*) *Haek v. Leonard*, 9 Mod. 9.

(*y*) *Wing v. Harvey*, 5 De G. M. & G. 265.

(*c*) *Hill v. Barclay*, *sup.*; *Bracebridge v. Buckley*, 2 Price, 200, 215.

(*z*) *Croft v. Lumley*, 5 E. & B.

(*d*) *Croft v. Goldsmid*, 24 Beav. 312.

land in a husband-like manner (*e*). All these cases are, however, now provided for by statute (see p. 233), and relief in accordance with its terms may be given notwithstanding the breach of any covenant, excepting those therein expressly excepted.

2. It is a common stipulation in public undertakings that shareholders shall forfeit their shares on non-payment of calls. It might at first sight seem that this presented a reasonable case for relief on payment of the arrears with interest; but equity has, on grounds of public policy, refused to interfere in these cases (*f*). What distinguishes them from the case of a lessee who allows his rent to fall into arrear, is that in the former case the undertaking is usually of a more or less speculative character, and it would be inequitable to allow a shareholder to lie by and withhold his calls indefinitely until the chances of success were fully ascertained. The danger of a multiplicity of actions arising in case relief was so afforded has also been of weight in the decisions. Where, however, in the articles of association of a public company there is no stipulation or clause conferring upon directors a power to declare shares forfeited, they have no implied power to do so (*g*). And wherever such a power of forfeiture is provided, it will be strictly construed, and every condition prescribed for its exercise must be complied with (*h*).

Forfeiture of shares for non-payment of calls.

It is a common term in contracts for the sale of land that the purchaser shall pay a certain sum as a deposit, and that if the purchaser does not complete the purchase and pay the balance of the purchase-money on the day named, the vendor shall be at liberty to re-sell and recover any deficiency in price as liquidated damages. Under such a contract the Court will not relieve the purchaser from the forfeiture of the deposit if he fails to

Forfeiture of deposit on sales.

(*e*) *Hills v. Rowland*, 4 De G. M. & G. 430.

(*f*) *Sparks v. Liverpool Water-works*, 13 Ves. 428.

(*g*) *Re National, &c. Co.*, 7 W. R. 379; *Clarke v. Hart*, 6 H. L. 633.

(*h*) *Ibid.*; *Bottomley's Case*, 16 Ch. D. 631.

complete *within a reasonable time* (i). But in order to entitle the vendor to retain the deposit there must be acts on the part of the purchaser which amount to a repudiation of the contract (k).

Statutory penalties.

3. The Court has no jurisdiction to grant relief against any penalties imposed by statute (l). Within this principle fall penalties imposed by benefit building societies in accordance with their rules under 6 & 7 Will. IV. c. 92 (m).

Persons may not elect between an agreement and a penalty.

4. Though in many cases, as above shown, equity relieves against a penalty or forfeiture which has been incurred by a breach of contract, it will not suffer a person who has entered into an agreement to escape the obligation of specifically performing it by electing to pay the penalty stipulated in case of non-performance. The case of *French v. Macale* (n) is usually referred to on this question. There it was laid down by Lord St. Leonards that "if a thing be agreed upon to be done, though there is a penalty annexed to its performance, yet the very thing must be done"; and the rule applies whether the contract be to do or to abstain from doing anything (o).

French v. Macale.

Contracts varying on certain conditions.

But care must be taken to distinguish between such cases and those in which a certain sum is agreed to be paid as the price of or consideration for doing or abstaining from doing a given act—for instance, where a lessee covenants to reside on the premises or not to plough land, and if otherwise to pay an additional rent. Here the additional rent will not, on the one hand, be regarded as a penalty, so as to be relieved against, nor on the other hand can the lessee be restrained from exercising the option given to him (p). Where the contract is of this nature, the Court will not infer from the fact of the additional

(i) *Howe v. Smith*, 27 Ch. D. 89; *Soper v. Arnold*, 35 ib. 384; *Exp. Barrell*, 10 Ch. 512.

(k) See and distinguish *Palmer v. Temple*, 9 Ad. & E. 508.

(l) *Keating v. Sparrow*, 1 Ba. & Be. 367; *Re Brain*, 18 Eq. 389.

(m) *Parker v. Butcher*, 3 Eq. 762; *Provident P. B. Soc. v. Greenhill*, 9 Ch. D. 122.

(n) 2 Dr. & W. 269.

(o) *Ibid.*; *Fox v. Scard*, 33 Beav. 327.

(p) *Rolfe v. Peterson*, 2 Bro. P. C. 436; *Hardy v. Martin*, 1 Cox, 27.

sum reserved being disproportioned to the actual damage resulting that it is in the nature of a penalty (*q*); but if together with a covenant for additional payment there is also a clause of forfeiture, the payment will then, it seems, be deemed a penalty (*r*).

5. The cases last discussed illustrate the distinction between a penalty and liquidated damages, on which distinction the whole of the present question turns. It has already been seen that the mere use of the term liquidated damages, or even an express agreement that a sum shall be considered as such, is not conclusive as to its character. The Court will look at the whole transaction in order to determine whether the payment provided for is rightly to be regarded as a penalty or not (*s*); and in doing so, the Court will seek to give effect to the clearly expressed intention of the parties, and not to overrule their agreements on the ground "that judges know the business of the people better than they know it themselves" (*t*).

6. By the recent Conveyancing Act (*u*) the powers of the Court to relieve against the forfeiture of leases has been largely increased. It is thereby enacted that a right of re-entry or forfeiture under any proviso or stipulation in a lease, or a breach of any covenant or condition therein, shall not be enforceable by action or otherwise until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach (if capable of remedy), and to make reasonable compensation in money, to the satisfaction of the lessor. Where the lessor is proceeding by action or otherwise to enforce such right of

Liquidated
damages.

(*q*) *Chilliner v. C.*, 2 Ves. sr. 528. 298, 304.

(*r*) *French v. Macale*, *sup.*

(*t*) *Per Jessel, M. R.*, in *Wallis*

(*s*) *Dimech v. Corlett*, 12 Moo. P. v. *Smith*, 21 Ch. D. 243.

C. 199; *Jones v. Green*, 3 Y. & J.

(*u*) 44 & 45 Vict. c. 41, s. 14.

re-entry or forfeiture, the lessee may apply to the Court for relief, which the Court may grant or refuse on such terms as it may think fit. The statute expressly excepts from its operation covenants or conditions against assigning, underletting, or parting with the possession, or disposing of the land leased, and also covenants or conditions in mining leases to allow the lessor to inspect the mine or its books, &c., and it does not affect the law relating to re-entry or forfeiture or relief for non-payment of rent (*x*). It relates to existing as well as to future leases, and repeals 22 & 23 Vict. c. 35, ss. 4—9, and 23 & 24 Vict. c. 126, s. 2.

(*x*) *Scott v. Matthew Brown & Co.*, 51 L. T. 746.

CHAPTER V.

MORTGAGES AND LIENS.

SECTION I.—MORTGAGES AT LAW AND IN EQUITY.

- I. *Mortgages at Common Law.*
- II. *The Equity of Redemption.*
 - Howard *v.* Harris.
 - Casborne *v.* Scarfe.
 - Thornborough *v.* Baker.
- III. *Assignment of Mortgages.*
- IV. *Persons entitled to Redeem.*
- V. *Time of Redemption.*
- VI. *Mortgages of a Wife's Property.*
- VII. *Mortgages of Personalty.—Bills of Sale.*

I. *Mortgages at Common Law.*

1. THE common law recognised two kinds of landed security, *vivum vadium* and *mortuum vadium*. The *vivum vadium* consisted of a feoffment to the creditor and his heirs until out of the rents and profits he had satisfied himself his debt. The creditor took possession, received the rents, and applied them in liquidation of the debt. When it was satisfied the debtor might re-enter and maintain ejectment. It seems to have been called *vivum vadium* because neither debt nor estate was lost.

2. The *mortuum vadium* was a feoffment to the creditor and his heirs to be held until the debtor paid his debt, *Mortuum vadium*.

until which time the creditor received the rents without account. The estate was unprofitable or *dead* to the mortgagor in the meantime, the original debt remaining undiminished. As in the *vivum vadium*, so in this security, the estate was never lost to the debtor.

Welsh mortgage.

3. Both these securities have long been obsolete, but there still exists a form of security which somewhat resembles each of them, namely, the Welsh mortgage. This consists of a conveyance of an estate to the creditor and his heirs to be held until the debt is discharged, the creditor meanwhile receiving the rents and profits as an equivalent for interest, while the principal remains undiminished. No covenant for the payment of the debt is inserted in the mortgage-deed, and the mortgagee has no power to compel redemption or foreclosure, though the mortgagor may redeem at any time (*a*). The Statute of Limitations (*b*) would probably bar the right of redemption at the expiration of twelve years from the *satisfaction of the debt*, but would not commence to run until then, the possession being up to that point not adverse (*c*).

The modern mortgage.

4. In the place of the ancient contracts of *vivum vadium* and *mortuum vadium* arose the modern mortgage, which is thus described by Littleton (*d*): "If a feoffment be made upon such condition that if the feoffor pay to the feoffee at a certain day, &c., forty pounds of money, then the feoffor may re-enter; in this case the feoffee is called tenant in mortgage. . . . If the feoffor doth not pay, then the land, which is put in pledge upon condition for the payment of the money, is taken from him for ever . . . and if he doth pay the money, then the pledge is dead as to the tenant, &c."

How regarded at law.

The mortgage was thus an estate upon condition; a feoffment was made to the creditor with a condition in the deed of feoffment, or in a deed of defeazance executed at

(*a*) *Howell v. Price*, Prec. Ch. 423.

(*b*) 37 & 38 Vict. c. 57.

(*c*) Coote, p. 357, ed. 5.

(*d*) s. 332.

the same time, by which it was provided that on payment by the mortgagor or feoffor of a given sum at a time and place certain, it should be lawful for him to re-enter. Immediately on the livery made, the mortgagee or feoffee became the legal owner of the land, and in him the legal estate vested, subject to the condition. If the condition was performed the feoffor re-entered, and was in possession of his old estate. If the condition was broken, the feoffee's estate became absolute and indefeasible.

The common law generally required strict performance of conditions; and with respect to conditions in mortgages, the rules on which it acted were, if not so rigid as were observed in some cases, nevertheless sufficiently so to work great hardship on mortgagors. There were unbending requirements as to the time and manner of payment, any neglect of which resulted in the irremediable loss of the estate, however much it might exceed in value the sum advanced.

Conditions required to be strictly performed.

II. *The Equity of Redemption.*

1. It is evident that the above stated principles of common law are repugnant to the general doctrines of Courts of equity, according to which unreasonable penalties ought always to be relieved against. In the jurisprudence of the prætors at Rome, it had been established that where property was pledged for a debt, the debtor might redeem the estate on payment of the debt at any time before the passing of a judicial sentence confirming the creditor in his estate. The Court of Chancery could not, indeed, alter the legal effect of the forfeiture at law; it could not deprive the conveyance of its legal effect; but it brought the Roman principle into operation by another means. Acting *in personam* on the conscience of the mortgagee, equity declared it unreasonable that he should retain for

General principle;

how established.

Mortgages
fell within
jurisdiction of
equity.

his own benefit what was intended merely as a pledge, and it adjudged that the mortgagor had an "equity to redeem" the estate on payment within a reasonable time of the principal debt with proper interest and costs, notwithstanding the forfeiture at law (*e*). Thus was established, without direct interference with legal doctrines, the right known as the equity of redemption. So beneficial was this equitable interference found to be, and so tenaciously did the Courts of law still adhere to their rigid system, that mortgages soon fell almost entirely within the jurisdiction of the Court of Chancery, and have so continued to the present time. Now, by s. 34, sub-s. 3, of the Judicature Act, 1873 (*f*), the redemption and foreclosure of mortgages are expressly assigned to the Chancery Division of the High Court of Justice.

Attempts to
evade the
equity by
covenant.

2. No sooner, however, was the equity of redemption established, than another bold decision was required to confirm the principle in its utility. It was found that creditors, eager to regain the unjust advantage which the law had afforded them, attempted to evade the fairer doctrine of equity by requiring their debtors expressly to preclude themselves by agreement from their right to redeem. Fortified by this express stipulation, they sought to rely on the maxim *modus et conventio vincunt legem*, and to assert this in opposition to the interference of equity. But the firmness of the Courts of equity prevented this result. Always looking "*at the intent rather than at the form*" of things, these Courts laid it down that the debtor could not by any engagement entered into at the time of the loan preclude himself from his right to redeem, and generally that it was inequitable that a creditor should obtain, through the necessities of his debtor, and under colour of a mortgage, a collateral advantage beyond the payment of principal, interest, and costs.

(*e*) *Langford v. Barnard, Tothill*,
134; decided in 1594.

(*f*) 36 & 37 Vict. c. 66.

On this point the case of

HOWARD v. HARRIS

[1 Vern. 190 ; 2 W. & T. L. C. 1058]

is a leading authority. It established the rule, curtly expressed in the phrase "once a mortgage always a mortgage," that the same deed could not at one time be a mortgage, and at another an absolute conveyance. Other authorities have added to this other principles of a similar nature. Thus equity would not allow a stipulation that the mortgagor shall not pay the mortgage debt, or institute proceedings for redemption for twenty years (*g*), or that the mortgagee shall be receiver of the rents of the estate with a commission (*h*), or that the mortgagee in possession shall receive a certain sum for management (*i*). At one time a stipulation for the payment of compound interest was discountenanced, as savouring of usury, but the former strictness has been relaxed in this respect (*k*). Such interest, however, can only be charged by special agreement (*l*). It is admissible, while reserving a given rate of interest, to agree that on punctual payment the interest shall be reduced (*m*) ; but if it is stipulated that the rate of interest shall be raised unless punctually paid, this the Court will consider to be of the nature of a penalty, and will relieve against (*n*). But an agreement to pay a future commission from the day of non-payment of interest has been sustained (*o*) ; and if there is a proviso for reduction of interest on punctual payment, a mortgagee in possession through the mortgagor's default is entitled to the higher rate (*p*).

"Once a mortgage always a mortgage."

Invalid stipulations.

(*g*) *Cowdry v. Day*, 1 Giff. 316.

(*h*) *Langstaffe v. Fenwick*, 10 Ves. 405.

(*i*) *Comyns v. C.*, 5 I. R. Eq. 583 ; *Eyre v. Hughes*, 2 Ch. D. 198.

(*k*) Coote, 943, 945, ed. 5 ; *Clarkson v. Henderson*, 14 Ch. D. 348.

(*l*) *Daniell v. Sinclair*, 6 App. C.

181.

(*m*) *Nicholls v. Maynard*, 3 Atk. 519.

(*n*) *Ibid.* ; *Stanhope v. Manners*, 2 Ed. 199.

(*o*) *General Credit, &c. Co. v. Glegg*, 22 Ch. D. 549.

(*p*) *Union Bank, &c. v. Ingram*, 16 Ch. D. 53.

In accordance with the same principle, equity will not allow a mortgagee to contract with the mortgagor *at the time of the loan*, for the absolute purchase of the lands at a specified sum in case of default in payment at a stated time (*q*). He may, however, agree for a preference of pre-emption in case of sale, and this will be enforced if claimed within a reasonable time (*r*).

Distinction
between
mortgage and
sale on condi-
tion

3. The important distinction must also be observed between a mortgage and an absolute sale of an estate with a proviso for the vendor to re-purchase upon certain terms. If the Court considers that the transaction was not intended as a mortgage, but as such a conditional sale, it will bind the vendor strictly to his contract (*s*). So also where there is an absolute conveyance with a *subsequent* agreement that if the vendor desires it he may have his estate again upon repayment of the purchase-money with interest or costs (*t*).

depends on
the circum-
stances of
each particu-
lar case.

There being this important distinction between the effect of a mortgage and that of a conditional sale, it is necessary to consider what circumstances will furnish a criterion by which to distinguish between the two transactions; since it is evident that they will often *primâ facie* much resemble one another. There is no positive rule of law for this purpose; it depends upon the particular circumstances of each case. Parol evidence will always be admitted to show that an apparent conveyance was intended as a security only (*u*). If the money alleged to be purchase-money is grossly inadequate as a price for the estate, or if interest is paid on the money, or the grantee accounts for the rents, or the grantor remains in possession, these are circumstances tending to show that the transaction was really a mortgage, and not a sale (*x*). The general

Parol evi-
dence.

(*q*) *Price v. Perrie*, Freem. 258.

(*r*) *Orby v. Trigg*, 2 Eq. Ca. Abr. 599; *Dawson v. D.*, 8 Sim. 346.

(*s*) *Alderson v. White*, 2 De G. & J. 97.

(*t*) *Cotterell v. Purchase*, Ca. t. Talb. 61.

(*u*) *England v. Codrington*, 1 Ed. 169; *Maxwell v. Montacute*, Prec. Ch. 526.

(*x*) *Brooke v. Garrod*, 3 K. & J. 608; 2 De G. & J. 62; *Williams v. Owen*, 5 My. & Cr. 303.

principle is that *prima facie* an absolute conveyance, containing nothing to show the relation of debtor and creditor, does not cease to be a conveyance, and become a mortgage, merely because the vendor stipulates that he shall have a right to re-purchase. The question is, what upon a fair construction is the meaning of the instrument (y).

There may also be a valid sale or release of the equity of redemption by the mortgagor to the mortgagee, and even if the consideration is inadequate, it will be enforced in the absence of fraud or duress (z).

Release or sale of equity of redemption.

Where the conveyance of an estate to a person by way of mortgage is intended to be in the nature of a family settlement, the equity of redemption may, contrary to the general rule, be confined to the life of the settlor or mortgagor, and his heirs will not be allowed to redeem (a).

Mortgage by way of family settlement.

4. The case of

Equity of redemption an estate.

CASBORNE v. SCARFE

[1 Atk. 603; 2 W. & T. L. C. 1051]

shows that an equity of redemption is not a mere *right*, as was considered in some early cases. It is, on the contrary, an estate in the land, and may be dealt with as such; for instance, it may be devised, granted, or entailed with remainders, and such entail and remainders might be barred by fine and recovery. Or it may be settled or mortgaged; only so, however, that all incumbrances subsequent to the first, if he has the legal estate, will take subject to his prior right.

Further, the owner of an equity of redemption being considered as owner of the land, on his death intestate the descent of the equity of redemption will be governed by the same rules of law as the legal estate, whether the

(y) Coote, 20—22, ed. 5; Shaw v. Jeffry, 13 Mo. P. C. 432.

(z) Ford v. Olden, 3 Eq. 461.

(a) Newcomb v. Bonham, 1 Vern. 7; Bonham v. Newcomb, *ibid.* 214; King v. Bromley, 1 Eq. Ca. Abr. 595.

general rules of law or those of a special custom, such as gavelkind or borough English (*b*).

5. The leading case of

THORNBOROUGH v. BAKER

[1 Ch. Ca. 283; 3 Swanst. 628; 2 W. & T. L. C. 1046]

illustrated another incident of the equity of redemption: namely, that while in the case of a mortgage in fee, on the decease of the mortgagee, his *heir* must reconvey, on payment of the mortgage money, interest and costs, yet his *legal personal representative* will be entitled to the money. Now, however, power is conferred on the personal representatives to convey, the estate being deemed to vest in them as if it were a chattel real (*c*). In the case of an absolute conveyance with a collateral agreement for repurchase, if the purchaser dies seised, and the person who conveyed to him then exercises his option of repurchase, the heir, and not the executor, of the purchaser will be entitled to the money (*d*).

Legal personal representative of mortgagee entitled to mortgage debt.

III. *Assignment of Mortgages.*

A mortgagee has power alone at any time to assign the mortgage; but the assignee should for his own protection always obtain the concurrence of the mortgagor. This is necessary because the assignee can only take subject to all equities, and to the state of the account as between the mortgagor and mortgagee. If the mortgagor does not concur, he is not bound by the amount of the debt appearing upon the face of the mortgage. If, in fact, the mortgage debt has been paid off, the security is determined; if partly paid, it is determined *pro tanto* (*e*). Further, if

Mortgagee may assign alone; but assignee should require concurrence of mortgagor,

(*b*) *Fawcett v. Lowther*, 2 Ves. sr. 301, 304.

(*c*) 44 & 45 Vict. c. 41, s. 30.

(*d*) *St. John v. Wareham*, cited 3 Swanst. 631.

(*e*) *Matthews v. Wallwyn*, 4 Ves. 118; *Williams v. Sorrell*, *ibid.* 389.

a mortgage is assigned, and the assignee fails to give notice of the transfer to the mortgagor, his security is liable to be prejudiced by any payments made by the mortgagor to the mortgagee subsequent to the assignment (*f*). *A fortiori* a mortgagor cannot be prejudiced by any agreement between a mortgagee and his assignee to increase the amount of the principal due, as by converting interest into principal (*g*); but if the assignment is with the concurrence of the mortgagor, and there is an arrear of interest thereon, any interest paid by the assignee to the mortgagee will be taken as principal, and will carry interest (*h*).

or at least give notice.

Moreover, if a mortgagee is in possession, he is considered in equity for many purposes as a trustee; and then, if he voluntarily assigns the mortgage, without the consent of the mortgagor, he will still remain liable to account for the profits, on the principle that it would be a breach of trust to assign to an unreliable person (*i*). This is not so, however, where the assignment is directed by order of the Court (*k*).

Mortgagee in possession accountable after assignment.

It has been questioned whether, in cases in which an assignee purchases a mortgage for less than is due upon it, he is entitled to claim from the mortgagor the whole of the original sum, or only the amount which he has paid. As a general rule, it appears that he is entitled to the benefit of his purchase, and may claim the whole debt (*l*). But if the purchaser stands in any fiduciary relation towards the owner of the estate, as trustee, executor, guardian, or agent, he will be considered as having purchased for the benefit of the estate, and will only be allowed repayment of what he actually gave (*m*).

Assignee may usually recover the whole mortgage debt.

Seeus if there is a fiduciary relation.

(*f*) *Chambers v. Goldwin*, 9 Ves.

254.
(*g*) *E. of Macclesfield v. Fitton*,
1 Vern. 169.

(*h*) *Ashenhurst v. James*, 3 Atk.
271.

(*i*) 1 Eq. Ca. Abr. 328.

(*k*) *Hall v. Heward*, 32 Ch. D.
430; *Magnus v. Queensland, &c.*
Bank, 36 *ibid.* 25.

(*l*) *Phillips v. Vaughan*, 1 Vern.
336; *Anon.*, 1 Salk. 155.

(*m*) *Morret v. Paske*, 2 Atk. 52,
54.

IV. *Persons entitled to Redeem.*

Persons entitled to redeem:

Having discussed some of the principal characteristics of an equity of redemption, the next inquiry is as to what persons are or may be entitled to redeem.

Heir.

(1.) We have seen that the equity of redemption may descend to an heir. In other words, an heir may redeem; and it is sufficient for him to show a *prima facie* title (*n*).

Devisee.

(2.) An equity of redemption may be devised—*i. e.*, a devisee may bring an action to redeem (*o*).

Assignee.

(3.) An equity of redemption may be assigned; thus, an assignee may redeem (*p*).

Trustee in bankruptcy.

(4.) An equity of redemption, being an estate in the mortgagor, devolves upon his bankruptcy upon the trustee; thus a trustee in bankruptcy is entitled to redeem (*q*).

Judgment creditors when their lien is complete.

(5.) Judgment creditors, who have a lien on an equity of redemption, are entitled to redeem (*r*); but it is necessary that they should have issued execution under 23 & 24 Vict. c. 38, or 27 & 28 Vict. c. 112 (*s*), as otherwise their lien on the land is not complete. It is to be observed that the appointment of a receiver operates as an equitable execution, and a judgment creditor is entitled to this remedy (*t*).

Plaintiff in administration suit.

(6.) A plaintiff in a creditor's suit for administration may, after a decree for sale of the real estate, bring an action against the mortgagee to redeem, in order to carry out the sale (*u*).

Crown on forfeiture.

(7.) When an equity of redemption became forfeited to the Crown, the Crown or its grantee might redeem (*x*). Under 33 & 34 Vict. c. 23, the administrator or interim curator of the estate of the felon may presumably do so.

(*n*) *Pym v. Bowreman*, 3 Swanst. 241, n.; *Lloyd v. Wait*, 1 Ph. 61.

(*o*) *Lewis v. Nangle*, 2 Ves. sr. 431.

(*p*) *Anon.*, 3 Atk. 314.

(*q*) *Franklyn v. Fern*, Barnard, Ch. 30.

(*r*) *Stonehewer v. Thompson*, 2 Atk. 440.

(*s*) *E. of Cork v. Russell*, 13 Eq. 210, 215.

(*t*) *Anglo-Italian Bk. v. Davies*, 9 Ch. D. 275; *Westhead v. Riley*, 25 *ibid.* 413.

(*u*) *Christian v. Field*, 2 Ha. 177.

(*x*) *Att.-Gen. v. Crofts*, 4 Bro. P. C. 136.

(8.) So a lord claiming the reversion by escheat may redeem a mortgage term (*y*). Lord on escheat.

(9.) Although a voluntary conveyance be void under 27 Eliz. c. 4, as against purchasers, and so against the mortgagee, who is *pro tanto* a purchaser, nevertheless a volunteer under such a conveyance of an equity of redemption may redeem (*z*). Volunteers.

(10.) In short, any person interested in the equity of redemption may redeem—*e. g.*, a dowress (*a*) ; a tenant for life, remainderman or reversioner (*b*), the tenant for life having the first option ; a tenant by the curtesy (*c*) ; and a jointress (*d*). Any person interested in equity of redemption.

(11.) Lastly, a subsequent mortgagee may redeem, making the mortgagor or his heir a party to his action (*e*). A subsequent mortgagee.

Any person entitled to redeem the mortgage may redeem any incumbrancer prior to himself on payment of his principal, interest and costs (*f*) ; and on tendering the redemption money he is entitled to a delivery of the title deeds, and to have a conveyance of the property redeemed (*g*).

A mortgagor entitled to redeem has power to require the mortgagee, instead of reconveying, to assign the mortgage debt, and convey the property to any third person (*h*) ; and this right can be enforced against any mortgagee who has not been in possession, by the mortgagor and each incumbrancer, notwithstanding any intermediate incumbrance. In case of conflicting claims, the requisition of a prior incumbrancer prevails over that of a subsequent incumbrancer or the mortgagor (*i*).

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| <p>(<i>y</i>) <i>Downe v. Morris</i>, 3 Ha. 394.
 59. (<i>z</i>) <i>Rand v. Cartwright</i>, 1 Ch. Ca.
 137. (<i>a</i>) <i>Palmer v. Danby</i>, Prec. Ch.
 (<i>b</i>) <i>Aynsly v. Reed</i>, 1 Dick, 249.
 (<i>c</i>) <i>Jones v. Meredith</i>, Bunb. 357.
 (<i>d</i>) <i>Howard v. Harris</i>, <i>sup.</i> p. 239.
 (<i>e</i>) <i>Fell v. Brown</i>, 2 Bro. C. C.</p> | <p>276 ; <i>Farmer v. Curtis</i>, 2 Sim. 446.
 (<i>f</i>) <i>Exp. Carr</i>, 11 Ch. D. 62 ;
 <i>Elton v. Curteis</i>, 19 <i>ibid.</i> 49.
 (<i>g</i>) <i>Pearce v. Morris</i>, 5 Ch. 227.
 (<i>h</i>) 44 & 45 Vict. c. 41, s. 15.
 (<i>i</i>) 45 & 46 Vict. c. 39, s. 12 ;
 <i>Teevan v. Smith</i>, 20 Ch. D. 724 ;
 and see <i>Alderson v. Elgey</i>, 26 <i>ibid.</i> 567.</p> |
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V. *Time of Redemption.*

No power to
redeem before
the time
named.

If not then,
six months'
notice.

1. A person cannot redeem before the time appointed in the mortgage deed, although he tenders to the mortgagee both the principal and the interest due up to that time (*k*). If he does not pay the debt at the appointed time, he must give six months' notice of his intention to do so, and pay punctually on the expiration of the notice, since it would evidently be unfair to the mortgagee to compel him to accept his money without giving him an opportunity of providing for its reinvestment. If, however, the mortgagee demands, or takes any steps to compel payment, no notice is required, nor is interest payable in lieu thereof (*l*).

If due notice is given, and then the mortgagee refuses to accept a full tender of the principal, interest, and costs, thus compelling the mortgagor to seek a remedy in an action for redemption, the mortgagee will be compelled to pay the costs of the action (*m*).

Limitation
apart from
the statute.

Disability.

Acknowledg-
ment.

2. Independently of the Statute of Limitations (*n*), a mortgagee could not generally be disturbed after twenty years' possession without any acknowledgment of the mortgagor's title (*o*). The imprisonment, infancy, coverture, or absence beyond seas of the mortgagor were regarded as exceptional circumstances entitling him to exceptional consideration, and, after the analogy of the older statute (*p*), ten years were allowed after the removal of the disability (*q*). Moreover, even in the absence of fraud or oppression, a very slight act of acknowledgment of title on the part of the mortgagee, such as keeping private accounts of the profits, sufficed to preserve the equity of redemption (*r*). *A fortiori* the keeping of ac-

(*k*) *Brown v. Cole*, 14 Sim. 427.

(*l*) *Letts v. Hutchins*, 13 Eq. 176;
Prescott v. Phipps, 23 Ch. D. 372.

(*m*) *Grugeon v. Gerrard*, 4 Y. & C.
Ex. 119, 128; *Harmer v. Priestley*,
16 Beav. 569.

(*n*) 3 & 4 Will. IV. c. 27.

(*o*) *Anon.*, 3 Atk. 313.

(*p*) 21 Jac. I. c. 16.

(*q*) *Jenner v. Tracy*, 3 P. Wms.
287, n.

(*r*) *Fairfax v. Montague*, cited 2
Ves. jr. 84; *Hansard v. Hardy*, 18
Ves. 455.

counts with the mortgagor or his heir, or an acknowledgment of the equity of redemption in a conveyance or devise would suffice for that purpose(s); and even parol evidence of the conversation of the mortgagee has been admitted on behalf of a mortgagor seeking redemption (t). But the acknowledgment, to be effectual, should, it seems, be made before the expiration of the statutory period (u).

Parol evidence.

3. Many of the difficulties which thus arose on the question of acknowledgment were put an end to by 3 & 4 Will. IV. c. 27, which fixed the limitation of the mortgagor's equity at twenty years after the time at which the mortgagee obtained possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor, or of his right of redemption, should have been given to the mortgagor or some person claiming his estate, or to an agent of such mortgagor or person, *in writing* signed by the mortgagee or the person claiming through him. The same statute further provides that if there be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment if given to any of such mortgagors or persons, shall be as effectual as if given to all; but that if there shall be more than one mortgagee, &c., the signature of one shall be only effectual against himself and the persons claiming through or under him (x).

Statute 3 & 4 Will. IV. c. 27, s. 28.

This section has now been replaced by the provisions of a more recent statute (y) which came into operation on the 1st January, 1879, and which enacts that when a mortgagee shall have obtained possession or receipt of the profits of land, or of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage, but

37 & 38 Vict. c. 57.

(s) *Smart v. Hunt*, 4 Ves. 478, n.;
Conway v. Shrimpton, 5 Bro. P. C.
187.

(t) *Perry v. Marston*, 2 Cox, 295.
See *Whiting v. White*, 2 Cox, 290.

(u) *Markwick v. Hardingham*, 15
Ch. D. 339.

(x) s. 28.

(y) 37 & 38 Vict. c. 57.

within *twelve* years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor or of his right to redemption shall have been given to the mortgagor, or to some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him; and in such case no action shall be brought but within twelve years after such acknowledgment. The provisions for the cases of an acknowledgment by one of two or more mortgagors or to one of two or more mortgagees correspond to those of the earlier act.

Time only runs when possession is adverse.

Time will not run under these acts against the mortgagor while the possession of the mortgagee is not adverse, but may be referred to another title; thus, for instance, if a mortgagee having purchased the estate of a tenant for life who has joined the remainderman in mortgaging the estate, enters into possession, time will not run against the remainderman during the life of the tenant for life (z), because until the death of the latter the mortgagee's possession does not conflict with the rights of the remainderman.

What is sufficient acknowledgment.

4. There are numerous cases respecting the question as to what is a sufficient acknowledgment within the statutes. It will be observed that by the language of both Acts the acknowledgment must be given to the mortgagor himself, or to those claiming his estate; an admission to a third person does not suffice, except indeed to an agent or solicitor of the mortgagor or claimant (a). No particular form of acknowledgment is required, nor need the amount due be stated (b); an acknowledgment will not, however, be inferred from equivocal expressions (c).

It has been decided that the sections suspending the

(z) *Hyde v. Dallaway*, 2 Ha. 528.

(a) *Trulock v. Roby*, 12 Sim. 402;
2 Ph. 395; *Stansfield v. Hobson*, 3
De M. & G. 620.

(b) *Ibid.*; *St. John v. Boughton*,
9 Sim. 219.

(c) *Thompson v. Bowyer*, 9 Jur.
N. S. 863.

running of the statute pending disability do not apply as between mortgagor and mortgagee (*d*).

VI. *Mortgage of Wife's Property by Husband and Wife.*

It is a well established rule that whenever a husband and wife join in mortgaging the wife's estate of inheritance for the benefit of the husband, her estate will be considered only as surety for his debt; and on the husband's death the wife or her heir will be entitled to have her estate exonerated out of his property, and will be preferred to the legatees, though not to the creditors of the husband (*e*).

Wife's estate considered only as a surety.

Upon the same principle where a wife paid her husband's mortgage debt by a loan out of her separate estate, she was held entitled to stand in the place of the mortgagee (*f*), and where she joined with him in charging her estate she was similarly entitled (*g*). *A fortiori*, if she alone mortgages her separate estate to raise money for her husband, she is in the same position as any other of his creditors (*h*).

If wife pays mortgage debt she may stand in place of the mortgagee;

But in order to claim exoneration from the husband's estate, the debt must be distinctly his debt. A mortgage of the wife's estate in order to pay debts contracted by her before marriage (*i*), or a mortgage effected before her marriage, which the husband afterwards covenants to pay, will not be charged against the husband's property to exonerate that of the wife (*k*). And the same rule applies if the wife receives into her own hands or has the absolute disposal of the mortgage money (*l*). The burden of proof

but the debt must be his debt.

The burden

(*d*) *Kinsman v. Rouse*, 17 Ch. D. 104; *Forster v. Patterson*, *ib.* 132.

(*e*) *Tate v. Austin*, 1 P. Wms. 264; *Hudson v. Carmichael*, Kay, 613, 620.

(*f*) *Parteriche v. Powlet*, 2 Atk. 384.

(*g*) *Ibid.*; *Robinson v. Gee*, 1 Ves. sr. 252.

(*h*) *Hudson v. Carmichael*, *sup.*

(*i*) *Lewis v. Nangle*, 1 Cox, 240; Amb. 150.

(*k*) *Bagot v. Oughton*, 1 P. Wms. 347.

(*l*) *Clinton v. Hooper*, 1 Ves. jr. 173; 3 Bro. C. C. 201, 212; *Thomas v. T.*, 2 K. & J. 79.

of proof on the husband's representatives.

Resulting trust for the wife.

is not, however, on the wife, to show that the money was applied for her husband's benefit, but it is for his representatives to show that it was not so (*m*) ; and they may avail themselves of parol declarations of the wife for this purpose (*n*).

Where the wife's estate is mortgaged, notwithstanding that the equity of redemption is reserved to the heirs of the husband, there will be a resulting trust for the wife and her heirs (*o*). The mere form of reservation is not sufficient to alter the previous title, but is considered as an inaccuracy or mistake to be corrected by the state of the title as it was before the mortgage (*p*).

Nevertheless, if it appears to have been the intention of the wife to alter the limitation of the equity of redemption, effect will of course be given to it. The presumption is the other way, but may be rebutted by satisfactory evidence (*q*).

VII. *Mortgages of Personalty—Bills of Sale.*

For the protection of creditors against secret dispositions of property to their prejudice, and at the same time for the protection of debtors against the machinations of money-lenders, mortgages of personal chattels have been made the subject of special legislation.

Before, however, directing attention to the provisions of the Acts by which such transactions are regulated, it is necessary to refer to certain rules which, apart from the statutes, distinguish mortgages of personalty from mortgages of real estate.

Mortgage contrasted with pledge.

First, the distinction must be observed between a mortgage and a pledge, a distinction analogous to that of Roman Law between the contracts of *hypotheca* and *pignus*.

(*m*) *Kinnoul v. Money*, 3 Swanst. 202, 208 n.

(*n*) *Clinton v. Hooper*, 1 Ves. jr. 173.

(*o*) *Huntingdon v. H.*, 2 Vern. 437 ; *Broad v. B.*, 2 Ch. Ca. 161.

(*p*) *Ruscombe v. Hare*, 6 Dow. 1 ; 2 Bli. N. S. 192 ; *Jones v. Davies*, 8 Ch. D. 205.

(*q*) *Jackson v. James*, 1 Bli. 104 ; *Reeve v. Hicks*, 2 S. & S. 403.

We have seen that a mortgage is a conveyance or transfer of property upon condition, becoming absolute if the condition is not performed, but subject to be avoided by performance of the condition. And this definition is as applicable to mortgages of personalty as to those of realty.

A pledge or pawn, on the other hand, is a security created by the actual or constructive delivery of the *possession* of a personal chattel to a bailee, or pledgee, the general property in the chattel remaining in the pledgor; the pledgee having only a special property or right of retainer until the payment of the debt secured (*r*). The law as to pledges does not require detailed exposition here, falling rather under the head of bailments at Common Law than under any doctrine of equity.

A pledgee can, only under special circumstances, sue in equity for foreclosure and sale of his pledge (*s*), though if a time for redemption has been fixed by the contract, he may, on giving due notice to the pledgor, sell without applying for the authority of a judicial decree (*t*). If no time has been fixed for payment there must be a previous demand (*u*). The same rules apply when the subject-matter of the security is a chose in action (*u*). A Court of Common Law, is, however, the proper forum for a pledgor seeking to redeem, unless the need of some special equitable relief, such as account, or an assignment of the pledge, necessitates an appeal for equitable assistance (*x*).

Mortgages of leaseholds generally follow the analogy of those of freeholds, giving rise to the same remedies of foreclosure or sale on the one hand, and redemption on the other. There is, however, an important distinction between such mortgages and mortgages of personal chattels. The

(*r*) *Jones v. Smith*, 2 Ves. jr. 372, 378.

(*s*) *Exp. Mountfort*, 14 Ves. 606; *Carter v. Wake*, 4 Ch. D. 605; *General Credit, &c. Co. v. Glegg*, 22 Ch. D. 549.

(*t*) *Martin v. Reid*, 11 C. B. N. S. 730; *Kemp v. Westbrook*, 1 Ves. sr. 278.

(*u*) *France v. Clark*, 22 Ch. D. 830; 26 *ib.* 257.

(*x*) *Jones v. Smith*, *sup.*

latter are indeed subject to redemption in the usual way (*y*); but the mortgagee, after breach of condition, has a right to sell, upon giving due notice, without suing for foreclosure (*z*).

Bills of Sale
Acts.

But the chief distinctions relating to such mortgages are those which arise from the provisions of the Bills of Sale Acts, 1854, 1878 and 1882 (*a*).

17 & 18 Vict.
c. 36.

The causes which led to legislation on this subject are well indicated in the preamble to the Act of 1854, which recites that "Frauds are frequently committed upon creditors by "secret bills of sale of personal chattels, whereby persons "are enabled to keep up the appearance of being in good "circumstances and possessed of property, and the grantees "or holders of such bills of sale have the power of taking "possession of the property of such persons to the exclusion of the rest of their creditors."

In order to check such dishonest obtaining of credit, this Act provided that all bills of sale of *personal chattels* whereby the grantee or owner should have the power, with or without notice, to seize or take possession of the property subject thereto, should, unless registered as therein directed, be void as against the assignees in bankruptcy, or under an assignment for the benefit of creditors of the grantor, and as against all persons seizing the property comprised therein in execution of any process of the Courts, so far as regarded the property in or right to the possession of any *personal chattels* comprised therein, which at or after the time of such bankruptcy or the execution of such assignment or of the executing such process, and after the expiration of twenty-one days, should be in the possession or *apparent possession* of the person making the bill of sale.

The great number and difficulty of the questions arising respecting the interpretation of this Act necessitated further legislation for their satisfactory solution. At the

(*y*) *Kemp v. Westbrook*, 1 Ves. sr. 261.
278.

(*a*) 17 & 18 Vict. c. 36; 41 & 42
(*z*) *Tucker v. Wilson*, 1 P. Wms. Vict. c. 31; 45 & 46 Vict. c. 43.

same time it was found necessary to provide for and counteract some ingenious modes of evading the Act which had been invented by keen practitioners, and further to provide for the protection not only of the creditors of the grantor, but of the grantor himself. Hence the more detailed and stringent measures of 1878 (*b*) and 1882 (*c*), by which statutes the law respecting mortgages of personal chattels is now regulated.

It must suffice to briefly summarize the results of this legislation.

1. Under the Act of 1878, the expression "Bill of Sale" includes assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods and other assurances of personal chattels, and also powers of attorney, authorities or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels or to any charge or security thereon shall be conferred. Meaning of
"bill of sale."

The Act of 1882 only applies to bills of sale or other documents included in the above category, which are given as security for money lent (*d*). It excludes from the operation of the Acts the debentures of incorporated companies; and it declares void all bills of sale for sums under £30 (*e*).

2. A bill of sale must now be duly attested and registered within seven days of its execution; and an affidavit must be registered with it stating the execution and the true date thereof, and the residence and occupation of the grantor and of the attesting witnesses. Registration.

If two or more bills of sale are given comprising in Priority.

(*b*) 41 & 42 Vict. c. 31.
(*c*) 45 & 46 Vict. c. 43.

(*d*) *Swift v. Pannell*, 24 Ch. D.
210.
(*e*) s. 12.

whole or in part the same chattels, they shall have priority in *order of the date of their registration* as regards such chattels (*e*). Moreover, the registration of a bill of sale must be renewed every five years (*f*) ; and where a subsequent bill of sale is executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale, and comprises all or any part of the personal chattels comprised therein, and is given as security for the same or any part of the same debt, such subsequent bill shall be absolutely void as regards such chattels and debt, unless proved to have been given *bonâ fide* to correct some material error in the prior bill of sale (*g*).

Form of bill
of sale.

3. If given as security for money lent, a bill of sale must contain a schedule specifically enumerating the personal chattels comprised therein, and is void, except as against the grantor, in respect of any personal chattels not so described (*h*) ; and must be made in accordance with the form in the schedule to this Act annexed. This form requires the consideration given to be stated, and also the rate of interest charged thereon (*i*), and the time or times at which the payments of principal and interest are to be made (*k*) ; and it further provides that the chattels assigned shall not be liable to seizure for any cause other than those specified in s. 7 of the Act ; namely, in case of (1) default by the grantor of payment, or in the performance of covenants necessary for maintaining the security ; or (2) in case of his bankruptcy, or distraint for rent, rates, or taxes ; or (3) on fraudulent removal of the goods ; or (4) on non-production without reasonable excuse of the last receipt for rent, rates, or taxes ; or (5) in case of execution levied against the goods of the grantor.

Definitions :

4. The expression "personal chattels" is in the present

(*e*) 41 & 42 Vict. c. 31, s. 10.

(*f*) s. 11.

(*g*) s. 9.

(*h*) 45 & 46 Vict. c. 43, s. 4.
See *Roberts v. R.*, 13 Q. B. D. 794 ;
Witt v. Banner, 19 *ib.* 276 ; 20 *ib.*
114 ; *Kelly v. Kellond*, *ib.* 569.

(*i*) See *Myers v. Elliott*, 16 Q. B. D. 526 ; *Exp. Stanford*, 17 *ib.* 259 ;
Lumley v. Simmons, 34 Ch. D. 698.

(*k*) See *Hetherington v. Groome*,
13 Q. B. D. 789 ; *Sibley v. Higgs*,
15 *ib.* 619 ; *Hughes v. Little*, 18 *ib.*
32.

Act more fully explained than in that of 1854. The Act of 1878 has expressly provided for some difficulties which arose under that Act, by enacting that personal chattels shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (*when separately assigned or charged*) fixtures and growing crops; but shall not include fixtures (except trade machinery as elsewhere described) when assigned together with a freehold or leasehold interest in any land or building to which they are affixed; nor growing crops when assigned together with any interest in the land on which they grow (*l*). Fixtures and growing crops are not to be deemed to be separately assigned or charged by reason only that they are assigned or charged by separate words, or that power is given to sever them, if by the same instrument any freehold or leasehold interest in the land or building to which they are affixed or in the land on which such crops grow, is also conveyed or assigned to the same persons or person (*m*).

Personal
chattels;

Trade machinery is the subject of important new provisions. A detailed and exhaustive definition thereof is given, and it is expressly declared to be within the expression personal chattels.

5. The definition of the term "apparent possession" remains in the Act of 1878 the same as in that of the 1854. The "occupation" must be a *de facto* occupation; mere tenancy without residence will not suffice (*n*), but if the debtor is allowed the use of the goods, notwithstanding the formal putting a man into possession for the grantee, the debtor is none the less deemed to be in apparent possession (*o*). *Secus*, however, if the man in possession really has control of the goods (*p*). Wrongful possession takes a case out of the Act (*q*).

Apparent
possession.

(*l*) s. 4.

(*m*) s. 7.

(*n*) *Robinson v. Briggs*, 6 L. R. Exch. 1.

(*o*) *Exp. Jay*, 9 Ch. 697; *Exp.*

Hooman, 10 Eq. 63; *Exp. Lewis*, 6 Ch. 626.

(*p*) *Re Francis*, 10 Ch. D. 408, 414.

(*q*) *Exp. Fletcher*, 5 Ch. D. 809.

It was enacted by the Act of 1878 (*r*) that chattels comprised in a bill of sale which has been and continues to be duly registered under the Act shall not be deemed to be in the possession, order, or disposition of the grantor of the bill of sale within the meaning of the Bankruptcy Act. This section has been repealed by the Act of 1882, s. 15, in respect of bills of sale given by way of security; but notwithstanding the repeal the effect of s. 3 of the last Act is that chattels comprised in a bill of sale registered under the Act of 1878 before the coming into operation of the Act of 1882 are not, so long as the registration is subsisting, within the order and disposition clause (*s*).

It must suffice here to specify these salient points of importance in connexion with the Bills of Sale Acts, but the Student is recommended to refer carefully to the Acts themselves, and he will find an exhaustive comparison and exposition of the two statutes in Coote on Mortgages, pp. 509—537, 5th edit.

(*r*) s. 20.

(*s*) *Exp. Izard*, 23 Ch. D. 409.

SECTION II.—RIGHTS OF MORTGAGOR AND MORTGAGEE.

- I. *Mortgagor in Possession.*
- II. *Accounting.*
- III. *Remedies of Mortgagees.*
- IV. *Tacking.*
 - Marsh v. Lee.
 - Brace v. Duchess of Marlborough.
- V. *Consolidation.*

I. *Rights of a Mortgagor in Possession.*

While a mortgagor remains in possession he is not required to account for the rents and profits of the mortgaged estate (*t*); nor is his agent, or any person claiming under his voluntary revocable deed (*u*). He is not liable to pay an occupation rent, unless and until a receiver is appointed, and demand made (*x*).

He has not, however, an unrestricted power of dealing with the estate as its owner. As soon as default has been made, he is in the position somewhat analogous to that of a tenant at will of the mortgagee: he is liable to eviction without any notice (*y*); but, herein differing from a tenant at will, he has no right to the emblements, these being part of the security (*z*).

By 44 & 45 Vict. c. 41, s. 18, a mortgagor *in possession* is enabled to make certain leases valid against any incumbrancer, and a mortgagee in possession is enabled to make

Not account-
able for
profits.

After default
liable to eviction.

Powers of
leasing.
44 & 45 Vict.
c. 41.

(*t*) *Colman v. D. of St. Albans*, 3 Ves. 25.

(*u*) *Hele v. Bexley*, 20 Beav. 127.

(*x*) *Yorkshire Banking Co. v. Mul-*

lan, 35 Ch. D. 125.

(*y*) *Doe d. Roby v. Maisy*, 8 B. & C. 767.

(*z*) *Keech v. Hall*, Doug. 22.

similar leases valid against all prior incumbrancers and the mortgagor. The leases so authorised are agricultural leases for twenty-one, and building leases for ninety-nine years, taking effect in possession not later than twelve months after date; they must reserve the best reasonable rent, and in other respects comply with the provisions of the Act. When made by a mortgagor in possession, a counterpart must be delivered to the mortgagee. The Act came into operation on the 1st Jan., 1882, and only applies to mortgages made after that date. These powers may, moreover, be excluded or increased by express contract. In cases not within the statute, neither mortgagor nor mortgagee could alone make a valid lease, unless, of course, power so to do was reserved by the deed (*a*), or under exceptional circumstances (*b*).

Mortgagor may be restrained from waste, if the security is thereby endangered.

Since the produce of the land is considered as part of the security, a mortgagor in possession may be restrained by injunction from committing waste on the estate, as, for instance, from cutting timber (*c*). A mortgagee is not, indeed, as a matter of course, entitled to such an injunction; it is necessary for him to show that his security is likely to be prejudiced thereby, being already, or in consequence of the waste in danger of becoming, insufficient (*d*).

Mortgaged shares may qualify the mortgagor to act as a director of a company (*e*). The mortgagor of an advowson has, on the living becoming vacant, a right to nominate, and may compel the mortgagee to present his nominee, notwithstanding an express agreement to the contrary (*f*).

Can sue in his own name under Jud. Act, 1873, s. 25, sub-s. 5.

Previous to the Jud. Act, 1873 (*g*), a mortgagor, though in possession, could not sue in his own name to recover the land or its rent against a lessee to whom he had leased the land before the mortgage, nor could he sue a trespasser or

(*a*) *Keech v. Hall*, Doug. 22.
 (*b*) *Hungerford v. Clay*, 9 Mod. 1.
 (*c*) *Farrant v. Lovell*, 3 Atk. 723.
 (*d*) *King v. Smith*, 2 Ha. 239;
Harper v. Alpin, 54 L. T. R. 383.

(*e*) *Pulbrook v. Richmond, &c. Co.*,
 9 Ch. D. 610.
 (*f*) *Mackenzie v. Robinson*, 3 Atk.
 558.
 (*g*) 36 & 37 Vict. c. 66.

other wrong-doer in his own name for damages. By this statute this disability has been removed, and it is enacted that "a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession, or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession or the recovery of such rents and profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person" (*h*).

II. *Accounting between Mortgagor and Mortgagee.*

1. A mortgagee being, by virtue of his mortgage, legal owner of the land, is, on default being made by the mortgagor, entitled at law to immediate possession, or, if the land be in lease, to receipt of the rents, and equity will not interfere to prevent him from enforcing this remedy. He may enter into possession at any time, and without notice (*i*). He is, however, liable in damages if he enter before default (*k*).

The mere fact that mortgagees are in receipt of the rents and profits of the mortgaged estate does not necessarily make them chargeable as mortgagees in possession. The question whether they are so chargeable depends upon whether *they have taken out of the mortgagor's hands the power and duty of managing the estate*, and dealing with the tenants. Thus an agent of a mortgagor was in the habit of receiving the rents and applying them in payment of interest to the mortgagees; the mortgagees wrote to him inclosing notices to the tenants to pay the rents to them,

(*h*) s. 25, sub-s. 5.

(*k*) *Moore v. Shelley*, 8 App. C.

(*i*) 2 Mer. 359; *Lows v. Telford*, 285.

1 App. C. 414.

which he was to serve on them if the mortgagor should attempt to interfere. The agent replied promising to pay the rents to the mortgagees and not to the mortgagor, and he did so, but the notices were not served on the tenants. The Court considered that the agent had not ceased to be agent for the mortgagor, that the management of the estate was not taken out of his hands, and that the mortgagees were not chargeable as if in possession (*l*).

A mortgagee is, moreover, not deemed to be in possession merely because the mortgage deed contains an attornment clause, so as to be accountable for the rent reserved by the clause (*m*).

Mortgagee in possession must account strictly.

If no arrears when possession taken, annual rests.

When in possession, the mortgagee must strictly account for the rents and profits of the mortgaged estate, and if he occupies any part of it himself he will be charged an occupation rent (*n*). If there be no arrears of interest due at the time he takes possession, and the rents and profits exceed the amount of the interest, the account will generally be taken with annual rests, so that the excess of rent may be annually applied in reducing the principal (*o*). And this applies as well in the case of an occupation rent as in that of other rents and profits (*p*).

Except in mortgage of leaseholds where security is deficient.

In the case, however, of a mortgage of leasehold property, where there is no reasonable certainty that the ground rent and insurance will be duly paid, or the houses kept in repair, the mortgagee is entitled to enter into possession even though no interest is in arrear; and in such a case annual rests will not be directed against him (*q*). The burden of proving the reasonableness of his entry into possession is, however, upon the mortgagee (*q*).

If interest in arrear, annual rests not directed.

If the interest is in arrear when the mortgagee enters into possession, annual rests will, as a rule, not be directed (*r*); and where the liability to account without

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| (<i>l</i>) <i>Noyes v. Pollock</i> , 32 Ch. D. 53. | 254. |
| (<i>m</i>) <i>Stanley v. Grundy</i> , 22 Ch. D. 478. | (<i>p</i>) <i>Wilson v. Metcalfe</i> , 1 Russ. 530. |
| (<i>n</i>) <i>Smart v. Hunt</i> , 1 Vern. 418, n. | (<i>q</i>) <i>Patch v. Wild</i> , 30 Beav. 99. |
| (<i>o</i>) <i>Shepherd v. Elliott</i> , 4 Mod. | (<i>r</i>) <i>Wilson v. Cluer</i> , 3 Beav. 136. |

annual rests has thus once commenced, it continues on the same footing until changed by some further agreement (*s*). The fact that the arrears of interest are subsequently paid off does not of itself entitle the mortgagor to have rests directed in his favour (*t*). If, however, the whole of the debt is paid off by the receipt of the rents, from that time annual rests will be decreed (*u*). Until whole debt is paid off.

2. A mortgagee in possession who sells part of the mortgaged property under a power of sale in the mortgage, must apply the proceeds of sale first in payment of interest and costs, and then either pay the balance to the mortgagor, or apply it in reduction of the principal due on the mortgage (*x*). A rest will always be directed at the time of the sale if any surplus of sale money beyond the interest and costs is retained by the mortgagee, notwithstanding that interest may have been in arrear when he entered into possession (*y*). Application of proceeds of sale.

3. A mortgagee in possession holding over after payment of his claims will be charged with any surplus receipts, and with simple interest at four per cent. thereon (*z*). The Court may in its discretion direct compound interest (*a*). Mortgagee holding over after full payment.

In accounting, a mortgagee in possession is, as a rule, only liable for fair rents and profits, or for what he has actually received (*b*). If, however, he has been guilty of wilful default in not receiving them, as by turning out a good tenant, or by letting at less than is offered, he will be charged with what he might have received (*c*). Mortgagee only charged with what he actually receives.

4. A mortgagee in possession is liable to account for any damage done to the property, as by pulling down buildings Account of damages, expenditure,

(*s*) *Scholefield v. Lockwood*, 32 Beav. 439.

(*t*) *Davis v. May*, G. Coop. 238; 19 Ves. 383.

(*u*) *Wilson v. Cluer*, *sup.*

(*x*) And see 44 & 45 Vict. c. 41, s. 21, sub-s. 3.

(*y*) *Thompson v. Hudson*, 13 Eq. 497.

(*z*) *Quarrel v. Beckford*, 1 Madd. 269.

(*a*) *Wilson v. Metcalfe*, *sup.*

(*b*) *Simmings v. Shirley*, 6 Ch. D. 173; *Shepard v. Jones*, 21 ib. 469.

(*c*) *Hughes v. Williams*, 12 Ves. 493; *Parkinson v. Hanbury*, 2 L. R. H. L. 1.

improperly (*d*), or by destroying or losing the title deeds (*e*). On the other hand, he will be allowed for money laid out in necessary repairs, with interest thereon (*f*). So also he will be allowed the costs of protecting the title of the mortgagor (*g*), and, generally speaking, all costs reasonably incurred in relation to the mortgage debt (*h*).

and moneys
paid for
reasonable im-
provements.

5. Further, he will be allowed for moneys laid out, with the mortgagor's consent or acquiescence, in the improvement of the property (*i*). And if even without such consent he has reasonably expended money in permanent works on the property, he is entitled, on taking the accounts, to an inquiry whether the outlay has increased the value of the property; if it has done so he is entitled to be repaid his expenditure so far as it has increased such value (*k*). He should not, without the mortgagor's acquiescence, however, lay out money so as largely to increase the value of the property, and thus place it beyond the power of the mortgagor to redeem (*l*).

Speculative
outlay not
required,
or proper.

He is not bound to engage in any speculative adventure for the benefit of the estate, as by opening mines or quarries (*m*), which must be at his own risk and hazard. If mines are already opened, he should not make large outlay in improving them (*n*).

Waste only
allowed when
security
insufficient.

6. Until recently, it was only when a mortgaged estate was insufficient in value to pay the mortgage, that a mortgagee in possession might open mines and cut timber (*o*). If, having a sufficient security, he committed such waste, he was charged with the gross receipts, and disallowed the

(*d*) *Sandon v. Hooper*, 6 Beav. 246.

(*e*) *Brown v. Sewell*, 11 Ha. 49.

(*f*) *Sandon v. Hooper*, *sup.*; *Eyre v. Hughes*, 2 Ch. D. 148.

(*g*) *Sandon v. Hooper*, *sup.*; *Parker v. Watkins*, Johns. 133.

(*h*) See discussion as to costs generally, *National Prov. Bank v. Games*, 31 Ch. D. 582; and also *Smith v. Watts*, 22 Ch. D. 12; *Bird v. Wenn*, 33 *ib.* 219; *Seton*,

1059, ed. 4.

(*i*) *Trimleston v. Hamill*, 1 Ba. & Be. 385.

(*k*) *Shepard v. Jones*, 21 Ch. D. 469.

(*l*) *Sandon v. Hooper*, *sup.*

(*m*) *Hughes v. Williams*, 12 Ves. 493.

(*n*) *Rowe v. Wood*, 2 J. & W. 553.

(*o*) *Millett v. Davy*, 31 Beav. 470.

expenses of working (*p*). Now he is empowered when in possession to cut and sell timber and other trees ripe for cutting, not planted or left for shelter or ornament. This applies only to mortgages made after Dec. 31st, 1881. 44 & 45 Vict. c. 41.

A mortgagee in possession is responsible for the integrity of the property; thus, a mortgagee was required to account for the proceeds of coal dug from the mortgaged land by the trespass of adjacent coal-owners (*q*). Formerly a mortgagee of houses could not insure them against fire at the mortgagor's expense in the absence of an express agreement with him, nor could he require the mortgagor to insure them. The power to insure and add the premiums to the mortgaged debt was given by Lord Cranworth's Act (*r*); and by 44 & 45 Vict. c. 41, ss. 19 and 23, this power is confirmed and regulated, the insurance money being limited, in the absence of stipulations to the contrary, to two-thirds the value of the property. Property must be preserved.

III. Remedies of the Mortgagee.

1. In addition to his right to possession, a mortgagee has also, of course, a right at any time after payment of the debt has become due to sue the mortgagor for the money. Moreover, as it would be unjust that a mortgagee should be subject to a perpetual account by the perpetual continuance of the mortgagor's equity of redemption, he is allowed, after giving a reasonable notice for the payment of the debt, to come into equity and sue for the foreclosure of the equity of redemption; in other words, he may seek a decree which will give him the entire equitable as well as the legal interest in the property; or, in the alternative, he may seek the enforcement of a sale of the estate. May sue for the debt, and for foreclosure or sale.

2. An additional remedy is sometimes provided for a mortgagee by the insertion in the mortgage deed of an Attornment clause.

(*p*) *Millett v. Davy, sup.*

(*q*) *Hood v. Easton*, 2 Giff. 692.

(*r*) 23 & 24 Vict. c. 145, s. 11.

Distrain.

Rent must be reasonable,

not amounting to fraudulent preference.

Action for foreclosure.
Usual form.

attornment clause, that is, a proviso that in case default shall be made in payment of the mortgage debt, the mortgagor shall continue to remain in possession as a tenant of the mortgagee, paying a certain specified rent, usually the same in amount as the interest. This provision enables the mortgagee, if necessary, to utilise the special remedy provided for the recovery of rent by landlords; namely, distraint. Whether the rent reserved equals or exceeds the interest, the mortgagee has a *prima facie* right to apply the proceeds of a distress in satisfaction of principal as well as interest (*r*). The rent reserved must, however, be of reasonable amount with regard to the value of the premises (*s*). If it is exorbitant, or the attornment is expressed only to come into operation on bankruptcy, it will be deemed a fraudulent preference and void (*t*).

3. The legal remedy of the mortgagee on his covenant for payment of the mortgage debt, and his equitable remedy of foreclosure, may now be pursued in one action. If the mortgage debt and interest is proved, admitted, or agreed upon at the trial, the judgment is that the plaintiff do recover against the defendant the total sum of principal and interest, and so much of his costs (to be taxed) as would have been incurred if the action had been brought for payment only.

If the amount of the debt and interest is not so proved, admitted, or agreed, the Court directs an account of what is due to the plaintiff for principal and interest under the covenant contained in the mortgage, and orders that the plaintiff do recover against the defendant the amount which shall be certified to be due to him on taking such account, and also so much of his taxed costs as would have been incurred if the action had been brought for payment only.

In either of the two cases, the Court further orders an account of what is due to the plaintiff by virtue of his

(*r*) *Exp. Harrison*, 18 Ch. D. 127.

(*s*) *Re Stockton, &c. Co.*, 10 Ch. D. 335; *Exp. Loisey*, 21 Ch. D. 442.

(*t*) *Exp. Williams*, 7 Ch. D. 138;

Exp. Jackson, 14 Ch. D. 725; and see *Exp. Isherwood*, 22 Ch. D. 384.

mortgage, and for his costs of the action (to be taxed), and directs that in taking such account anything the plaintiff shall have received from the defendant under the aforesaid judgment is to be deducted, and the balance due to the plaintiff to be certified (*u*).

One month is usually allowed for payment of what is proved or admitted to be due on the covenant (*u*). On the amount due on the security and for costs beyond this being certified, a further period is given for payment, and in default of payment, the order for foreclosure is made, and, on being signed and enrolled, the foreclosure is complete, and the mortgagor's equity extinguished.

In the case of a foreclosure suit against an infant heir or devisee of the mortgagor, there is, with the mortgagee's consent, usually an inquiry whether foreclosure or sale would be more beneficial for the infant (*x*). If a sale appears beneficial, it may be decreed at once (*y*). If a foreclosure is decreed, the decree is binding on the infant, unless, on being served with a subpoena to show cause against the same, he shall, within six months after attaining his majority, show to the Court good cause to the contrary. This he must do by putting in a new defence, and showing error in the decree (*z*). An immediate foreclosure may be decreed against an infant, where the Court is of opinion that such a course is for his benefit (*a*). The same rule, however, does not apply to married women, against whom the ordinary procedure is employed, without a day being given to show cause (*b*).

Even after a foreclosure has been absolutely decreed, signed and enrolled, the Court will show indulgence to the

Where heir or devisee of mortgagor is an infant.

Day to show cause.

Time may be enlarged after decree ;

(*u*) *Farrer v. Lacy, Hartland & Co.*, 31 Ch. D. 42. For a form of judgment when the debt is to be paid by instalments, see *Greenough v. Littler*, 15 Ch. D. 93. And where the mortgagee is in possession and receipt of rents, see *Jenner-Fust v. Needham*, 31 *ib.* 500; 32 *ib.* 582.

(*x*) *Monday v. M.*, 1 V. & B. 223.

(*y*) *Davis v. Dowding*, 2 Keen, 245, 247.

(*z*) *Mallock v. Galton*, 3 P. Wms. 352; *Davis v. Dowding*, *sup.*; *Mellor v. Porter*, 25 Ch. D. 158.

(*a*) *Wolverhampton, &c. Bank v. George*, 24 Ch. D. 707.

(*b*) *Mallock v. Galton*, *sup.*

or decree re-opened under special circumstances.

Power of sale and appointment of a receiver under 44 & 45 Vict. c. 41, incident to every mortgage.

mortgagor by enlarging the time for payment, if a proper case can be shown, and the security be not deficient (*c*). There must, however, be a strong reason shown, and an immediate payment of interest and costs (*d*). A decree of foreclosure has been re-opened even after the mortgagee has been in possession sixteen years (*e*); but only under special circumstances, such as fraud or collusion in obtaining the decree (*f*).

4. The necessity for a foreclosure suit is generally obviated by the insertion of a power of sale in the mortgage deed; a power, however, which in no way prejudices the right to foreclosure (*g*). By Lord Cranworth's Act (*h*), a power of sale was rendered incident to every mortgage or charge by deed affecting any hereditaments of any tenure or any interest therein, executed after the 28th August, 1860. By 44 & 45 Vict. c. 41, ss. 19, 20, these powers have been confirmed. The power of sale, however, cannot be exercised until notice requiring payment of the mortgage money has been served on the mortgagor (*i*), and default has been made in payment thereof for three months after such service, or until some interest under the mortgage is in arrear and unpaid for two months after becoming due, or until there has been a breach of some provision contained in the mortgage or in this Act other than a covenant for payment of the mortgage money and interest. Under the previous Act, which still governs mortgages executed previously to the 1st of January, 1882, six months' notice in writing was required, and the power could not be exercised until the principal debt had been due a year, or the interest was in arrear six months. In both cases the powers in question may be excluded by express stipulation.

(*c*) *Thornhill v. Manning*, 1 Sim. N. S. 451; *Cocker v. Bevis*, 1 Ch. Ca. 61.

(*d*) *Coombe v. Stewart*, 13 Beav. 111.

(*e*) *Burgh v. Langton*, 5 Bro. P. C. 213.

(*f*) *Loyd v. Mansel*, 2 P. Wms. 73.

(*g*) *Stade v. Rigg*, 3 Ha. 35.

(*h*) 23 & 24 Vict. c. 145, ss. 11—16.

(*i*) See *Hoole v. Smith*, 17 Ch. D. 434.

5. By the Chancery Amendment Act (*k*), the Court of Sale by the Chancery was empowered in any case to direct a sale of the mortgaged property instead of foreclosure on such Court. 44 & 45 Vict. c. 41, s. 25. terms as it might think fit. And under that Act a sale was usually directed where there was such complication of interests that a common foreclosure decree could not be conveniently worked, or it was on other grounds manifestly for the benefit of the parties (*l*). This Act has now been repealed in this respect, and replaced by the more comprehensive provisions of the Conveyancing Act, 1881 (*m*). By s. 25 of this statute, it is provided (1) that any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption in the alternative; (2) that in any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and notwithstanding the dissent of any other person, and without allowing any time for redemption or payment of any mortgage money, may direct a sale of the mortgaged property on such terms as it thinks fit; and this without previously determining the priorities of incumbrancers.

Under this section the Court has jurisdiction to order a sale at any time before the foreclosure has become absolute (*n*), and may do so on an interlocutory application (*o*). The Court will take into consideration the amount of the mortgage debt and the circumstances of the case generally, in the exercise of its judicial discretion (*p*).

(*k*) 15 & 16 Vict. c. 86.

(*o*) *Woolley v. Coleman*, 21 Ch. D.

(*l*) *Hurst v. H.*, 16 Beav. 372; *Newman v. Selfe*, 33 ib. 522.

169.

(*m*) 44 & 45 Vict. c. 41.

(*p*) *Wade v. Wilson*, 22 Ch. D. 235; *Merchant Bkg. Co. v. London*

(*n*) *Union Bank v. Ingram*, 20 Ch. D. 463.

and *Hanseatic Bank*, 55 L. J. Ch. 479.

Receiver,

6. Again, a mortgagee has a further remedy in the power to require the appointment of a receiver of the rents and profits of the mortgaged property, when the mortgage money has become due (*q*). The powers and duties of the receiver are specified in s. 24 of the Act. Before action brought the receiver may be appointed by the mortgagee; but afterwards application should be made to the Court for the purpose (*r*).

Remedies
may be
pursued
concurrently.

7. The general rule of equity was, formerly, that a party suing at law could not sue in equity at the same time. A mortgagee has, however, always been permitted to pursue all his remedies at the same time. He may at once eject the mortgagor, sue on the covenant for payment in his deed, and on a bond given as a collateral security, and also proceed in equity for foreclosure or sale; and this, we have seen, in the same action. If he obtains full payment on the bond or covenant, or by receipt of the rents and profits, the mortgagor is entitled to redeem the estate, and there can be no foreclosure or sale; but if only partially paid, he may still go on and foreclose (*s*).

But action for
payment after
foreclosure re-
opens the
foreclosure,
and cannot
be brought
unless mort-
gagee can still
convey the
estate.

If he first sues for foreclosure, and afterwards sues for payment on his covenant, the effect of such personal action is to re-open the foreclosure, and give the mortgagor a renewed right to redeem. If the mortgagee still has the estate in his power, there is no objection to his action; only on payment of the whole debt he must reconvey the estate to the mortgagor. If, on the contrary, he has so dealt with the mortgaged estate as to be unable to restore it on tender of full payment—for instance, if he has sold it—he can no longer sue for the mortgage money (*t*). Hence it is evident that his best course is to proceed in one action to enforce all his remedies, or first to pursue his

(*q*) 44 & 45 Vict. c. 41, s. 19, (iii.), 24.

(*r*) *Tillett v. Nixon*, 25 Ch. D. 238.

(*s*) *Palmer v. Hendrie*, 27 Beav. 349, 351.

(*t*) *Lockhart v. Hardy*, 9 Beav. 349; *Palmer v. Hendrie*, *sup.*; 28 Beav. 341.

legal remedies, and then to have recourse, if necessary, to those of equity.

8. If a mortgagor sues for redemption of a *legal* mortgage, and the action is dismissed for any reason except for want of prosecution, the dismissal operates as a decree of foreclosure against him. The action admits the debt and admits the mortgagee's title; being dismissed he cannot again sue for the same object, and the result is in effect foreclosure (*u*). The dismissal, however, of the similar action respecting an equitable mortgage would not have the same effect (*u*).

Dismissal of redemption action operates as foreclosure of legal,

but not of an equitable mortgage.

9. The following limitations affect the remedies of the mortgagee:—

By 3 & 4 Will. IV. c. 27, the right of a mortgagee to foreclosure was limited to a period of twenty years from the time of the last payment or demand of interest, or an acknowledgment of the mortgage on the part of the mortgagor or his representative or agent. This statute has now been replaced by the Real Property Amendment Act, 1874 (*x*), s. 8 of which enacts that “no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such

Limitation.

3 & 4 Will. IV. c. 27, s. 40.

37 & 38 Vict. c. 57.

(*u*) *Marshall v. Shrewsbury*, 10 Ch. 250.

(*x*) 37 & 38 Vict. c. 57.

“payments or acknowledgments, if more than one, was “given.”

3 & 4 Will. IV.
c. 27, s. 42.

Again, s. 42 of 3 & 4 Will. IV. c. 27, provides that no rent or interest in respect of any sum of money charged upon land or rent shall be recovered by any distress or action but within six years next after the same shall have become due, or shall have been formally acknowledged by the debtor or his agent. In case, however, of the sale of the property by a mortgagee, he may retain more than six years' arrears of interest out of the proceeds (*x*).

3 & 4 Will. IV.
c. 42.

And by 3 & 4 Will. IV. c. 42, it is enacted that all actions of covenant or debt upon any bond or specialty shall be sued and brought within twenty years after the cause of such actions and suits, or within twenty years after an acknowledgment by deed, or part payment, or part satisfaction.

Effect of the
statutes.

These limitations remain unaffected by the more recent statute. The result is, that an action for the recovery of a mortgage debt must be brought within twelve years from the accruing of the right, or of an acknowledgment or payment on account thereof (*y*); an action for foreclosure must be brought within the same period (*z*); and an action for arrears of rent or interest within a period of six years. If, moreover, there is the additional security of a bond or covenant, the period of limitation of the personal remedy thereunder is, under the recent statute, twelve years only (*a*), and this whether the covenant is contained in the mortgage itself, or in a collateral instrument (*b*). But the period of twenty years fixed by 3 & 4 Will. IV. c. 42, has been held still to apply in the case of a collateral bond given by a surety to secure the mortgage debt (*c*).

It must be observed that a payment of rent, in order to keep alive a mortgagee's right of foreclosure, must be

(*x*) *Marshfield v. Hutchens*, 34 Ch. D. 721.

D. 539; reversing 18 *ib.* 229.

(*y*) See *Pugh v. Heath*, 7 App. C. 235.

(*a*) *Sutton v. S.*, 22 Ch. D. 511.

(*b*) *Fearnside v. Flint*, 22 *ib.* 579.

(*z*) *Harlock v. Ashberry*, 19 Ch.

(*c*) *Lindsell v. Phillips*, 30 Ch. D. 291.

made with the knowledge of the mortgagor, or subsequently adopted by him (*d*).

The allowance of ten years in the period of limitation in favour of persons under disability by reason of infancy, coverture, idiocy, lunacy, unsoundness of mind, or absence beyond seas, from the termination of the disability, or from death (*e*), is not applicable as between mortgagor and mortgagee (*f*).

Formerly, if a trust term was created or agreed to be assigned for securing the payment of principal and interest, express trusts being excepted from the Statutes of Limitation, the amount of arrears recoverable was not limited to six years; nor was an action for the principal limited to twenty years (*g*). But by s. 10 of 37 & 38 Vict. c. 57, this effect of the security of an express trust was removed, and in such a case the limitation as against the land is now the same as if there were no trust (*h*). As against the trustee it remains as before the statute.

Trust term
for payment
formerly ex-
cepted from
limitation.

IV. *Tacking of Mortgages.*

The case usually cited as the leading authority on the doctrine of tacking is

MARSH v. LEE.

[2 Ventr. 337; 1 W. & T. L. C. 659.]

In this case one English being seised of the manor of Wicksall, and of the manor of Monfield, mortgaged, in 1649, part of the manor of Wicksall to Burrell for £1000. Afterwards, in 1655, he acknowledged a statute to Burrell

(*d*) *Harlock v. Ashberry*, *sup.*;
Newbould v. Smith, 29 *ib.* 882; 33 *ib.*
127.

(*e*) 3 & 4 Will. IV. c. 27, s. 16.

(*f*) *Kinsman v. Rouse*, 17 Ch. D.
104; *Forster v. Patterson*, *ib.* 132.

(*g*) *Cox v. Dolman*, 2 De G. M. &
G. 592.

(*h*) *Fisher, Mtg.* p. 345, ed. 4.
See *Banner v. Berridge*, 18 Ch. D.
254.

of £800 for the payment of £400. In 1662 English mortgaged both the manors to Mrs. Duppa for £7000. In 1665 English mortgaged the manor of Wicksall to Lee for £7000. Lee had no notice of the former mortgages, but he subsequently purchased Burrell's incumbrances.

The Lord Keeper Bridgeman, assisted by Hale, C. B., and Rainsford, J., held that Lee might make use of these incumbrances to protect his own mortgage, for that he had both law and equity on his side. He had *law*, for that he had a precedent mortgage in 1649, and also the statute in 1655; so that, while these remained in force, Marsh could not come in. He had *equity*, for he having a subsequent mortgage, yet it being without notice, he ought to be relieved in this Court.

Principle of
tacking.

The doctrine of tacking rests upon and illustrates two familiar maxims of equity—(1.) “*He who seeks equity must do equity*”: (2.) “*Where equities are equal the law shall prevail.*” It is equity that a debtor who has received a loan on the security of an estate shall, when he seeks to redeem his estate, pay all the debts which he owes to his creditor. If in the meantime the debtor has borrowed money from other persons on the same security, and the first creditor having the legal estate therein has subsequently without notice made further advances to the debtor, he has law and equity on his side, and may tack his subsequent advance to his original debt, notwithstanding that it may happen to prejudice an intermediate incumbrancer who has only an equitable security. Further, if a person lends his money only upon an equitable security, but without notice of any prior charge, he may, after receiving notice of such a charge, protect his security by purchasing the legal estate from a first incumbrancer; his loan without notice giving him an equal equity, and his securing the legal estate giving him a preference at law. The subject naturally resolves itself into two inquiries: first, as to the principles of tacking as against the mortgagor and his representatives; secondly,

as to the principles of tacking as against *mesne* or intermediate incumbrancers.

1. Tacking as against the mortgagor and his representatives.

A mortgagor must, before redemption, pay not merely the principal and interest of the mortgage debt, but also all the proper costs incurred by the mortgagee. And these costs include not only his costs of suits for redemption or foreclosure, taxed as between party and party (*i*), but all costs necessarily incurred by the mortgagee in maintaining the title to the estate (*k*), and generally those costs to which we have above seen that he is entitled in his accounts (*l*).

Mortgagor on redemption must pay principal, interest, and costs.

What costs included.

A mortgagee may, however, not only be refused his costs, but may even have to pay the costs of the mortgagor if he has necessitated a suit by refusing a tender of the full amount due (*m*), or by setting up a groundless defence (*n*), or has otherwise been guilty of vexatious conduct (*o*). Mere mistake, however, where his conduct has been in good faith is not sufficient to deprive him of costs (*p*).

Mortgagee may even have to pay costs.

Again, the mortgagee cannot be deprived of his pledge without payment of all sums of money due to him from his debtor which form a general or specific lien on the land; if, therefore, the mortgagee advance money by way of further charge or on a judgment, neither the mortgagor, nor, as a rule, anyone claiming under him, though for valuable consideration and without notice, can redeem without payment of the full amount (*q*). And equitable liens and charges may, equally with legal ones, be thus tacked to the original mortgage debt; for instance, an agreement for a mortgage, or an informal mortgage (*r*).

Mortgagor must pay all debts forming a specific lien on land.

Equitable as well as legal.

- (*i*) *The Kestrel*, 1 L. R. A. & E. 8. 197.
 (*k*) *Godfrey v. Watson*, 3 Atk. 518. (*o*) *Moore v. Painter*, 6 Jur. 903.
 (*l*) *Supra*, p. 262. (*p*) *Smith v. Watts*, 22 Ch. D. 12; *Bird v. Wynn*, 33 *ib.* 219.
 (*m*) *Roberts v. Williams*, 4 Ha. 129. (*q*) Coote, 878, ed. 5.
 (*n*) *Harvey v. Jebbutt*, 1 J. & W. 347. (*r*) *Matthews v. Cartwright*, 2 Atk.

S.

T

As against the mortgagor the question is: Was the further advance made on security of the land.

Only six years' interest can be tacked.

Not bond or simple contract debts.

Secus as against mortgagor's representatives.

Against them all debts may be tacked.

The test as to the application of the doctrine of tacking, as against the mortgagor, is whether the further advance was made on the security of the land. If so it may be tacked; if not, as against the mortgagor it cannot (s). Thus, though under a covenant in his mortgage, a mortgagor might, by virtue of 3 & 4 Will. IV. c. 42, have recovered twenty years' interest, yet since by 3 & 4 Will. IV. c. 27, he was only entitled to six years' arrears against the land, he could not tack more than this against the mortgagor, for the covenant creates no lien upon the land (t). On the same principle a bond debt, and *à fortiori* a simple contract debt, cannot be tacked as against a mortgagor (u).

But as against the representatives of a mortgagor the case rests on a different principle. Thus in the case of a bond debt, whether prior or subsequent to the mortgage, the heir and beneficial devisee of the debtor having been made by 3 & 4 Will. & M. c. 14, jointly liable for its payment, in order to avoid circuity and multiplicity of actions the bond debt was allowed to be tacked to the mortgage as against them (x). And on the same principle twelve years' arrears of interest may be tacked as against the heir or devisee of the mortgagor, if secured by a covenant in the mortgage deed binding the heirs (y), though only six years' arrears could be tacked as against the mortgagor himself.

Again, since 3 & 4 Will. IV. c. 104, which made real estate liable to simple contract debts, such debts may be tacked by any mortgagee of freehold or copyhold against the heir or devisee, in any cases in which there is not a devise for payment of debts (z). And similarly a mortgagee of a lease may tack a simple contract debt against

(s) *Lacy v. Ingle*, 2 Ph. 413.

(t) *Hunter v. Nockolds*, 1 Mac. & G. 640.

(u) *Coleman v. Finch*, 1 P. Wms. 777; *Jones v. Smith*, 2 Ves. jr. 376.

(x) *Heams v. Bance*, 3 Atk. 630; *Shuttleworth v. Laycock*, 1 Vern. 245.

(y) *Elvy v. Norwood*, 5 De G. & S. 240.

(z) *Rolfe v. Chester*, 20 Beav. 610.

the executor (a). But in neither case can either a bond or a simple contract debt be tacked as against a *creditor coming to redeem* (b).

2. Tacking as against mesne incumbrancers.

In this branch of the subject perhaps the most important authority that can be cited is the well known case of

BRACE v. THE DUCHESS OF MARLBOROUGH

[2 P. Wms. 491],

in which Sir Joseph Jekyll, M. R., laid down the following series of rules in exposition of the whole doctrine:—

(1.) “If a third mortgagee buys in the first mortgage, though it be *pendente lite*, pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage and got the law on his side and equal equity, he shall thereby squeeze out the second mortgagee; and this Lord Chief Justice Hale called a plank gained by the third mortgagee, or a *tabula in naufragio*, which constitution is in favour of a purchaser, every mortgagee being such *pro tanto*.”

Rules in *Brace v. Duchess of Marlborough*.

1. Third mortgagee purchasing first mortgage may tack.

This rule is that established by the earlier case of *Marsh v. Lee* (c), and includes the stronger case of a first and legal mortgagee making a further advance without notice of a second mortgage. There are certain limitations of the rule which require attention. Thus there can be no tacking unless both the securities are held by the creditor in the same right. He cannot tack a mortgage which he holds for his own benefit to one assigned to him as trustee for another person (d). Similarly the executor of a first mortgagee who had the legal estate in his own right, was not suffered as against a *mesne* incumbrancer to tack a

A fortiori first mortgagee making further advance without notice may tack; but creditor must hold both securities in the same right.

(a) *Coleman v. Winch*, *sup.*; *In re Haselfoot's Estate*, 13 Eq. 327.

(b) *Adams v. Claxton*, 6 Ves. 226; *Talbot v. Frere*, 9 Ch. D. 568.

(c) 2 Ventr. 337.

(d) *Morret v. Paske*, 2 Atk. 52; *Shaw v. Neale*, 6 H. L. 581.

mortgage of the equity of redemption which had vested in his testator as executor of another.

Conveyance of legal estate by express trustee does not give priority.

Nor does transfer of a satisfied mortgage

Notice by second mortgagee to first does not prevent tacking by the third mortgagee.

2. Judgment creditor cannot tack a mortgage to his judgment, the first sum not being lent on the security of the land.

No priority can be gained by the transfer of the legal estate by a person who holds it on an express trust for the first incumbrancer. The purchaser, in such a case, himself becomes a trustee (*e*). Similarly an incumbrancer getting in the legal estate from a person who is trustee for all the incumbrancers, with notice of their rights, gains no priority. The trustee is not to alter the priorities by preferring one of his *cestui que trusts* and conveying the legal estate to him (*f*). On the same principle it has been held that no priority is gained by the transfer, with notice of other incumbrances, of a satisfied mortgage, the legal mortgagee becoming on payment of his debt a mere trustee without any pecuniary interest (*g*); but in some circumstances the Court has refused to interfere to take away the privilege of the legal estate (*h*). It is clearly settled that notice given to the first mortgagee by the second, will not prevent the third mortgagee from tacking the third mortgage to the first if he purchases it (*i*).

(2.) The second rule is, "If a judgment creditor, or creditor by statute or recognizance, buys in the first mortgage, he shall not tack or unite the mortgage to his judgment, &c., and thereby gain a preference; for such a creditor cannot be called a purchaser, nor has he any right to the land; he has neither a *jus in re* nor a *jus ad rem*. All that he has by the judgment is a lien upon the land, but *non constat* whether he will ever make use thereof, &c. Besides which the judgment creditor does not lend his money on the immediate view or contemplation of the land, nor is he deceived or defrauded though his debtor had before made twenty mortgages of his

(*e*) *Allen v. Knight*, 5 Ha. 272; *Mumford v. Stohwasser*, 18 Eq. 556, 563.

(*f*) *Sharpley v. Adams*, 32 Beav. 213; *Maxfield v. Burton*, 17 Eq. 15.

(*g*) *Carter v. C.*, 3 K. & J. 617; *Prosser v. Rice*, 28 Beav. 68, 74.

(*h*) *Pilcher v. Rawlins*, 7 Ch. 259, 274; and see p. 319, *infra*.

(*i*) *Peacock v. Burt*, 4 L. J. N. S. Ch. 33.

“estate; whereas a mortgagee is defrauded or deceived if
“the mortgagor before that time mortgaged his land to
“another.”

The distinction here drawn between the specific lien of a mortgagee and the general lien of a judgment creditor, as regards tacking, seems to be sound in principle, and is well established (*k*); it has not been affected by 1 & 2 Vict. c. 110 (*l*). Since 27 & 28 Vict. c. 112, the land is not affected by a judgment, and no right to tack could be supposed to arise, until the land is delivered in execution by writ of *elegit* or otherwise; and when there has been actual delivery, even a prior mortgagee, though without notice of the *elegit*, could not tack a subsequent charge to his first mortgage (*m*).

The rule would seem to apply equally to prevent a prior judgment creditor from tacking a subsequent incumbrance, and to prevent a subsequent judgment creditor from tacking a prior incumbrance (*n*).

(3.) The third rule is that if the first mortgagee lends (*without notice*) a further sum to the mortgagor upon a statute or judgment, he shall retain against a *mesne* mortgagee until both his securities are satisfied.

3. A mortgagee may tack a judgment to his mortgage.

This is the converse of the last rule, and is supported by the converse of the reasoning there employed, for in this case the mortgagee *does originally lend his money especially upon the security of the land*, and may be considered to rely thereupon for all his debt (*o*). If, however, the mortgage is paid off before the judgment is recovered, although no reconveyance may have been made, the judgment cannot be tacked (*p*).

Unless the mortgage has been satisfied.

It will be observed that in all these cases there is no In these cases

(*k*) *Exp. Knott*, 11 Ves. 617.

(*l*) *Whitworth v. Gaugain*, 3 Ha. 416; see *Exp. Whitehouse*, 32 Ch. D. 512; *Badeley v. Consol. Bank*, 34 *ib.* 536; W. N. 1888, p. 30.

(*m*) *Champneys v. Burland*, 19 W. R. 148.

(*n*) Coote, 891, ed. 5.

(*o*) See also *Shepherd v. Titley*, 2 Atk. 348, 352; *Lloyd v. Atwood*, 3 De G. & J. 614.

(*p*) *Marquis of Brecon v. Seymour*, 26 Beav. 548.

tacking
prevented by
notice.

right to tack if at the time of advancing his money the mortgagee *had notice of an existing incumbrance*. It is the same in the case of a third mortgagee purchasing the first legal mortgage, and in the case of a first mortgagee seeking to tack a further advance, even if the first mortgage was expressly made to secure a sum and further advances (*q*). Thus a first mortgagee cannot tack a subsequent debt incurred *pendente lite* (the *lis pendens* being duly registered), because the suit would affect him with notice of the *mesne* incumbrance (*r*). The fact is that if there is notice at the time of the advance the *equities are not equal*; and then the possession of the legal estate will not prevail.

4. Where the legal estate is outstanding the priority follows the order of time,

(4.) The last rule in *Brace v. The Duchess of Marlborough* is: "When a *puisne* incumbrancer buys in a prior mortgage in order to unite the same to the *puisne* incumbrance, but it is proved that there was a mortgage prior to that, the Court clearly holds that the *puisne* incumbrancer where he had not got the legal estate, or where the legal estate was vested in a trustee, could there make no advantage of his mortgage; but in all cases where the legal estate is standing out, the several incumbrancers must be paid according to their priority in point of time." In other words, where, owing to the outstanding of the legal estate, the maxim "*where there is equal equity the law must prevail*" does not apply, then the maxim "*qui prior est tempore potior est jure*" applies.

unless one incumbrancer has a better right to call for it.

There is, however, a modification of this rule when one of the incumbrancers, though he has not the legal estate, has from the circumstances of the case a better right to call for it than another; for instance, if a declaration of trust has been made in his favour, or if he has secured possession of the title deeds (*s*). If this is the case, equity will place him in the same situation as if he had an

(*q*) *Rolt v. Hopkinson*, 9 H. L. 514; *Shaw v. Neale*, 20 Beav. 157; 6 H. L. 581; *Carlisle Bank v. Thompson*, 28 Ch. D. 398.

(*r*) *Morret v. Paske*, 2 Atk. 53; and see *Credland v. Potter*, 10 Ch. 8. (*s*) *Wyndham v. Richardson*, 2 Ch. Ca. 213.

actual assignment (*t*). And the result is the same where an incumbrancer obtains the legal estate after advancing his money in pursuance of a contract for a legal mortgage entered into at the time of the advance (*u*).

We have seen that bond and simple contract debts, not being specific liens on the land, cannot be tacked as against the mortgagor himself. *A fortiori*, whether prior or subsequent to the mortgage, they cannot be tacked as against any intervening incumbrancer, whether a mortgagee or judgment or bond creditor (*x*).

Bond and simple contract debts not tacked against a *mesne* incumbrancer.

The whole doctrine of tacking was displaced for a short time by the Vendor and Purchaser Act, 1874 (*y*), which enacted that from the 7th of August, 1874, no priority should be given or allowed to any interest in land by reason of such interest being protected by or tacked to the legal estate in such land. This enactment was, however, only in operation until the 31st of December, 1875, from which time it was repealed by the Land Transfer Act, 1875 (*z*).

37 & 38 Vict. c. 78.

38 & 39 Vict. c. 87.

By the Yorkshire Registries Act, 1884, provision is made for the registration of all mortgages of lands in Yorkshire, and registration is declared to constitute actual notice of such mortgages. The Act further provides that registered assurances thereunder shall have priority according to their respective dates of registration, and that priority shall not be gained by an application of the doctrine of tacking (*a*).

(*t*) *Pomfret v. Windsor*, 2 Ves. sr. 472, 486; *Wilmot v. Pike*, 5 Ha. 14, 22.

(*u*) *Cooke v. Wilton*, 29 Beav. 100.

(*x*) *Windham v. Jennings*, 2 Ch.

Rep. 247; *Lowthian v. Hazel*, 3 Bro. C. C. 162.

(*y*) 37 & 38 Vict. c. 78.

(*z*) 38 & 39 Vict. c. 87.

(*a*) 47 & 48 Vict. c. 54; 48 Vict. c. 4; 48 & 49 Vict. c. 26.

V. *Consolidation of Mortgages.*

Consolidation distinguished from tacking.

1. The doctrine of the consolidation of mortgages must be carefully distinguished from that of tacking. The principle of tacking applies as between successive incumbrances on one estate. The term consolidation of mortgages is applied to the general rule that where a mortgagor has mortgaged more than one estate to his mortgagee, he cannot claim to redeem one mortgage without redeeming all. This rule, which applies equally to redemption and foreclosure suits, to legal and equitable mortgages, and to real and personal property, may be thus concretely illustrated: A. mortgages Blackacre to B. for £1000, Blackacre being worth say £1500. Then A. further mortgages Whiteacre to B. for £500, and Whiteacre is found to be worth only £100. A. cannot then claim to redeem Blackacre, where the security is ample, alone. If he seeks to do so, he must also be prepared to redeem Whiteacre, which is an insufficient security for the money originally charged upon it (b).

Illustration.

Effect of notice.

2. And this doctrine of consolidation has been carried far beyond the simple case of a mortgage of two estates by one person to another. Thus, if A. sells Blackacre, or mortgages the equity of redemption of it to C., whether with or without notice of the existence of the other mortgage, the purchaser is just as much as A. himself bound by B.'s right to consolidate (c). Even where the mortgage of Whiteacre was effected after the sale or second mortgage to C., B. was held entitled to consolidate (d). That this may work great hardship on a second mortgagee or purchaser is very evident. Thus, referring again to the

(b) *Selby v. Pomfret*, 1 J. & H. 336; 3 De G. F. & J. 595; *Phillips v. Gutteridge*, 4 De G. & J. 531.

(c) *Beevor v. Luck*, 4 Eq. 537;

Titley v. Davies, 2 Y. & C. Ch. 399, n.

(d) *Vint v. Padget*, 1 Giff. 446; 2 De G. & J. 611.

figures above employed in illustration, C., not having any notice of the improvident mortgage of Whiteacre, may imagine that he is perfectly secure in giving £400 for, or lending it on a second mortgage of Blackacre. He would clearly be so if that estate could be redeemed alone. But he finds on seeking to do this, that B. can consolidate with the mortgage of Blackacre the mortgage of Whiteacre, which is worth £400 less than what was lent thereupon; and the result is that C.'s purchase or security is worth him nothing at all.

Again, the principle applies although the first mortgages of the several estates were originally made to different mortgagees, but have by transfer come into the hands of one mortgagee; for instance, if A. mortgages Blackacre to B., and Whiteacre to C., and C. afterwards assigns his mortgage to B. (e), or, *vice versa*, B. assigns his mortgage to C. (f). But it has been held that consolidation cannot be insisted on if the equity of redemption of the one estate has been sold or mortgaged previous to the transfer which brings the two mortgages to the same hand (g): *a fortiori*, if such sale or mortgage takes place previous to the creation of the mortgage of the other estate (h). In this case the knowledge of the possibility of the mortgages coalescing cannot be imputed to the second mortgagee or purchaser of the first estate. The case is yet stronger if at the time of the assignment the assignee had notice of the *puisne* mortgage (i). These cases in effect overrule the decision in *Tassel v. Smith* (k), and to a certain extent that in *Beavor v. Luck* (l), cases which for a long time bore very hardly upon purchasers and mortgagees of equities of redemption; and apart from the statutory displacement of the doctrine

First mortgages made to different persons.

(e) *Tweedale v. T.*, 23 Beav. 341.

(f) *Titley v. Davies*, *sup.*

(g) *Willie v. Lugg*, 2 Ed. 78; *Harter v. Colman*, 19 Ch. D. 630.

(h) *White v. Hillacre*, 3 Y. & C. Exch. 597; *Jennings v. Jordan*, 6 App. C. 698; 13 Ch. D. 639.

(i) *Baker v. Gray*, 1 Ch. D. 491.

(k) 2 De G. & J. 713.

(l) *Sup.*

presently to be noticed, the tendency of recent judicial decisions has been against an extension of the doctrine of consolidation.

Consolidation
in bank-
ruptcy.

3. A mortgagee may on the bankruptcy of the mortgagor, if his trustee does not at once redeem, take a transfer of a mortgage on another of his estates and consolidate it with a debt due on his own mortgage, and may thus hold the two estates as a security for both debts (*m*). He could not, however, take an original mortgage after notice of insolvency, as that would amount to a fraudulent preference (*n*).

Cases in
which consoli-
dation may
not take
place.

4. There can be no consolidation where the transactions in question are not between the same parties or persons claiming through them (*o*); so there can be no consolidation where one mortgage is by a firm, and the other by one of the partners thereof (*p*). This case also decides that there can be no consolidation where there has been no default in respect of one of the mortgages, for until default the estate is not at law forfeited. A bill of sale holder is not entitled to consolidate his security with a mortgage of land, so as to exclude an execution creditor (*q*). Nor will the principle be applied to the prejudice of persons claiming one of the properties under a voluntary settlement (*r*).

44 & 45 Vict.
c. 41, s. 17.

5. The recent Conveyancing and Law of Property Act in effect abrogates the principle of Consolidation as far as concerns mortgages executed after Dec. 31st, 1881. It enacts that a mortgagor seeking to redeem any one mortgage shall be entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than

(*m*) *Selby v. Pomfret*, 1 J. & H. 336; 3 De G. F. & J. 595.

(*n*) *Exp. Hotchkin*, 20 Eq. 746.

(*o*) *Jones v. Smith*, 2 Ves. jr. 376;
Higgins v. Frankis, 15 L. J. Ch. 329; 10 Jur. 328.

(*p*) *Cummins v. Fletcher*, 14 Ch. D. 699.

(*q*) *Chesworth v. Hunt*, 5 C. P. D. 266.

(*r*) *Re Walhampton Estate*, 26 Ch. D. 391.

that comprised in the mortgage which he seeks to redeem, *provided that no contrary intention is expressed in the mortgage deeds or one of them.* But the Act only applies where the mortgages are or one of them is made after the above-mentioned date (s). It has been held under this section that in the case of a redemption action comprising two properties, there can be no consolidation of costs; they must be rateably apportioned between the properties (t).

(s) 44 & 45 Vict. c. 41, s. 17.

D. 635; overruling *Clapham v.*

(t) *De Caux v. Skipper*, 31 Ch.

Andrews, 27 *ib.* 679.

SECTION III.—EQUITABLE MORTGAGES.

- I. *By Agreement.*
 - II. *By Deposit of Title Deeds.*
Russel v. Russel.
 - III. *Remedies.*
-

Classification. There are two species of equitable mortgages, which, though in many respects similar, are sufficiently distinct to require separate consideration.

The first class comprises those transactions viewed and treated in equity as mortgages, in which a person by agreement or mandate creates a charge upon his property.

The second and more peculiar class comprises equitable mortgages arising from the deposit of title deeds.

I. *Equitable Mortgages by Agreement or Mandate.*

Informal
agreements
for mort-
gages.

1. Any agreement in writing, however informal, by which any property, real or personal, is to be a security for a sum of money, is a charge, and amounts to an equitable mortgage. Thus an agreement that a creditor shall hold land at a fair rent to be retained in satisfaction of the debt, is in the nature of a mortgage, and will be supported as such (*u*).

On the principle that *what is agreed to be done is considered in equity as done*, an express written agreement to effect a mortgage is treated as a mortgage (*x*). So a written instrument promising to pay a sum of money with interest “out of the estate of the deceased W. H.,” and signed by all the persons interested in his estate, has been

(*u*) *Morony v. O’Dea*, 1 Ba. & Be.
109; *Coote*, 305.

(*x*) *Hankey v. Vernon*, 2 Cox, 12,
14; *Walsh v. Lonsdale*, 21 Ch. D. 9.

held (the personalty being exhausted) to amount to an equitable mortgage of the real estate (*y*). And an agreement by a married woman to charge her expectancy under the will, or as one of the next of kin of a living person, was on similar grounds enforced after that person's death (*z*). A covenant also that, if payment of a certain debt be not made, the creditor may by entry, foreclosure, sale, or mortgage, levy the amount from the lands of the debtor, is an equitable mortgage (*a*).

2. Another species of equitable mortgage is seen in mortgages of the equity of redemption of an estate which has been already legally mortgaged. But it is not necessary to enter into a separate discussion of such equitable mortgages, inasmuch as any particulars in which they differ from legal mortgages are fully explained under the heads of Notice and Tacking (*b*).

Mortgages of an equity of redemption.

II. *Equitable Mortgages by Deposit of Title Deeds.*

It is a well-known provision of the Statute of Frauds (*c*) that no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, be in writing and signed by the party to be charged therewith, or his duly authorised agent (*d*).

Statute of Frauds.

In the case of

RUSSEL v. RUSSEL

[1 Bro. C. C. 269; 1 W. & T. L. C. 726]

Russel v. Russel.

this was relied on as an answer to an action which sought to establish a charge on the mere fact of the deposit of

(*y*) *Suart v. Toulmine*, 2 Pow. Mtg. 1049 a, ed. 6.

(*z*) *Flower v. Buller*, 15 Ch. D. 665.

(*a*) *Eyre v. McDowell*, 9 H. L. 620.

(*b*) See pp. 309 *et seq.*, 271 *et seq.*

(*c*) 29 Car. II. c. 3.

(*d*) s. 4.

Deposit
sufficient
evidence of
an agree-
ment.

a deed. But the objection did not avail; and it has long been established that if the title deeds of an estate are, without even verbal communication, deposited by a debtor in the hands of his creditor, the mere fact of such deposit, if otherwise unaccounted for, is held to be *prima facie* evidence of an agreement for a mortgage of the estate; and the creditor may avail himself of it as of an agreement in writing for that purpose, and may bring an action for the completion of his security by a legal conveyance (*e*). These bold decisions have given rise to transactions which now form a conspicuous feature in equitable jurisprudence, and which require attentive consideration.

(1.) What constitutes a mortgage by deposit.

What deposits
sufficient.

(i.) It has already been stated that a deposit of title deeds, unaccompanied by any verbal agreement, is evidence of an agreement for a mortgage which may be enforced; and this proposition may be abundantly illustrated. Thus a deposit of a copy of Court rolls (*f*), of an agreement for a lease (*g*), of a policy of insurance (*h*), of a registered mortgage of a ship (*i*), or of a certificate of shares in a public company (*k*), may constitute an equitable mortgage.

Deposit of
part of deeds.

(ii.) An equitable mortgage may be created by a deposit of part of the title deeds only, and it is not necessary that the deeds deposited should show a good title in the depositor (*l*). But a deposit of deeds relating to part of an estate, with a representation that they relate to the whole, will only effect a mortgage of the part actually comprised in the deeds (*m*). If the deeds are deposited, some with one creditor, some with another, each may have a valid

(*e*) *Exp. Wright*, 19 Ves. 258;
Re McMahon, 55 L. T. R. 763.

(*f*) *Exp. Warner*, 1 Rose, 286.

(*g*) *Unity, &c. Co. v. King*, 25
Beav. 72.

(*h*) *Ferris v. Mullins*, 2 Sm. & G.
378.

(*i*) *Lacon v. Liffen*, 4 Giff. 75.

(*k*) *Exp. Moss*, 3 De G. & Sm.
599; *France v. Clark*, 26 Ch. D.
257.

(*l*) *Exp. Wetherall*, 11 Ves. 398;
Roberts v. Croft, 24 Beav. 223;
2 De G. & J. 1.

(*m*) *Jones v. Williams*, 24 Beav.
47.

charge (*n*). Moreover, if there are no title deeds or conveyances in the depositor's possession, an equitable mortgage may be created by the deposit of the receipt for purchase-money, containing the terms of the agreement for sale (*o*). Of receipt for purchase-money.

(iii.) Where land had to be registered under the Land Registry Act (*p*), an equitable mortgage might be created by a deposit of the land certificate (*q*), but not by that of the title deeds (*r*). The same provision is continued under the Land Transfer Act (*s*). Registered lands.

(iv.) A deposit of the deeds with a third person for the benefit of the creditor will be sufficient to create a security; and the possession of the agent of the debtor may suffice, if there is a memorandum of deposit showing an intention to make him a trustee (*t*). But a deposit with the wife of the debtor, to be kept by her for the creditor, was held insufficient (*u*); and where the deeds remain in the hands of the debtor, accompanied by a memorandum of deposit, there is no valid mortgage (*x*) unless indeed the debtor in fact holds them as the servant of the creditor (*y*). Deposit with third person.

(v.) But though a deposit of title deeds or their equivalent is evidence of an agreement for a mortgage which may suffice to establish a claim for relief in equity, it does not itself constitute an agreement. The depositor may show that the deposit was not made with the view and intent to effect a security, but with some other intent or for some other purpose. The mere possession of the title deeds is, therefore, not enough to create an equitable security (*z*). For instance, deeds may be deposited merely for the purpose of safe custody; or on some definite Depositor may show that there was no agreement, and that the purpose was not to effect a security.

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| (<i>n</i>) <i>Roberts v. Croft</i> , <i>sup.</i> | (<i>t</i>) <i>Lloyd v. Attwood</i> , 3 De G. & J. 614, 619. |
| (<i>o</i>) <i>Goodwin v. Waghorn</i> , 4 L. J. N. S. Ch. 172. | (<i>u</i>) <i>Exp. Coming</i> , 9 Ves. 115. |
| (<i>p</i>) 25 & 26 Vict. c. 53. | (<i>x</i>) <i>Adams v. Claxton</i> , 6 Ves. 226, 230. |
| (<i>q</i>) s. 73. | (<i>y</i>) <i>Ferris v. Mullins</i> , <i>sup.</i> |
| (<i>r</i>) s. 63. | (<i>z</i>) <i>Chapman v. C.</i> , 13 Beav. 308. |
| (<i>s</i>) 38 & 39 Vict. c. 87, s. 81. | |

condition (*a*); or there may be attendant circumstances showing that there was no intention to create a mortgage, as, for instance, where deeds have been left with a banker after he has refused to advance money on them (*b*); or the deposit may be accompanied by a memorandum showing that there was not an intention to create a security (*c*). In none of these cases will an equitable mortgage be created; but where the possession of the deeds cannot be accounted for save on the supposition that a mortgage was intended, it amounts to a presumption of such intention so strong that it may be acted upon (*d*).

Deposit for purpose of creating a legal mortgage.

(vi.) Where deeds are deposited for the purpose of preparing a legal mortgage, a presumption arises of an intention to create an equitable mortgage. At one time it was sought to distinguish between the case where the intention was to secure an antecedent debt, and where it was with a view to secure only a future advance, it having been held that in the latter case no equitable mortgage arose from the deposit (*e*). But it seems that this distinction cannot be sustained, and that now in all cases an equitable mortgage will result from the deposit (*f*). This will clearly be the case if an agreement to give a mortgage accompanies the deposit (*g*).

Written memorandum sufficient without deposit.

(vii.) A valid equitable mortgage may, as we have seen, be created by a written agreement apart from any deposit; and a written memorandum of deposit is a sufficient agreement (*h*), especially if the deeds be already in the possession of a third party (*i*). But in no case can a mere oral agreement without an actual deposit create an equitable

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| <p>(<i>a</i>) <i>Burton v. Gray</i>, 8 Ch. 932.
 278. (<i>b</i>) <i>Lucas v. Dorrien</i>, 7 Taunt.
 (<i>c</i>) <i>Shaw v. Foster</i>, 5 L. R. H. L.
 340; <i>Spoile v. Whayman</i>, 20 Beav.
 607.
 (<i>d</i>) <i>Featherstone v. Fenwick, Har-</i>
 <i>ford v. Carpenter</i>, 1 Bro. C. C. 270, n.;
 <i>Dixon v. Muckleston</i>, 8 Ch. 155.</p> | <p>(<i>e</i>) <i>Norris v. Wilkinson</i>, 12 Ves.
 192.
 (<i>f</i>) <i>Edge v. Worthington</i>, 1 Cox,
 211; <i>Exp. Bruce</i>, 1 Rose, 374.
 (<i>g</i>) <i>Hockley v. Bantock</i>, 1 Russ.
 141; <i>Keys v. Williams</i>, 3 Y. & C.
 Ex. 55.
 (<i>h</i>) <i>Exp. Orrett</i>, 3 Mont. & A.
 153.
 (<i>i</i>) <i>Daw v. Terrel</i>, 33 Beav. 218.</p> |
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security (*k*). The question to consider in the case of an oral agreement is whether or not the deposit can be regarded as a part performance thereof, so as to take it out of the Statute of Frauds (*l*).

(2.) **The effects of an equitable mortgage by deposit.**

i. *As to the property affected.*

Primâ facie, the deposit of deeds by a debtor constitutes a mortgage of all the property comprised in them (*m*). But the security may be limited by a written memorandum to that effect (*n*). If, on the contrary, the memorandum refers to deeds which are not deposited, it does not effect a mortgage of the property comprised in them (*o*). Thus the memorandum may limit but may not extend the effect of the deposit, unless, of course, the memorandum is in such a form as in itself to constitute an equitable mortgage.

What property is deemed to be mortgaged.

Memorandum may limit the effect of the deposit.

A deposit of title deeds will comprehend any interest which the depositor may afterwards acquire in the property (*p*), and will include not only fixtures existing at the time, but also those subsequently erected thereon, whether the fixtures are mentioned or not (*q*). And the result is the same whether the deposit is made by the owner in fee who is also owner of the fixtures, or by a lessee who is owner of the fixtures, although as between landlord and tenant they are removable (*r*). On the bankruptcy of the depositor of a lease, the fixtures will not be considered as being in his order and disposition, but will belong to the mortgagee (*s*); and where fixtures are not separately assigned, no registration of the deed is necessary under the Bills of Sale Acts (*t*).

After-acquired property.
Fixtures,

in bankruptcy.

(*k*) *Exp. Coombe*, 4 Madd. 349.

(*l*) *Re Beetham*, 18 Q. B. D. 380, 766.

(*m*) *Ashton v. Dalton*, 2 Coll. 566.

(*n*) *Exp. Glyn*, 1 M. D. & De G. 29.

(*o*) *Exp. Powell*, 6 Jur. 490.

(*p*) *Pryce v. Bury*, 16 Eq. 153.

(*q*) *Exp. Price*, 2 M. D. & De G.

518; *Exp. Astbury*, 4 Ch. 630.

(*r*) *Exp. Loyd*, 3 D. & C. 765; *Longbottom v. Berry*, 5 L. R. Q. B. 123; *Meux v. Jacobs*, 7 L. R. H. L. 481.

(*s*) *Exp. Barclay*, 5 De G. M. & G. 403.

(*t*) 41 & 42 Vict. c. 31, ss. 4, 5; *Re Armitage*, 14 Ch. D. 379.

Interest of depositor only affected.

A deposit of title deeds can only affect the interest of the depositor. Thus, if the deposit be by a trustee, and there is no consent or acquiescence of the *cestui que trust*, the security extends only to any beneficial interest which the trustee may have (*u*); and a deposit by a tenant for life cannot affect the interest of remainder-men (*x*).

ii. *What debts it may secure.*

Primâ facie only debts advanced at time of deposit secured. Circumstances or evidence may extend this.

It is a matter of evidence what debts are to be deemed to be comprised in the security of an equitable mortgage. *Primâ facie* only the sum advanced at the time of the deposit is considered to be secured thereby (*y*); but the circumstances of the case may suffice to show an intention to secure antecedent advances, and if so it will be carried into effect (*z*); and either written or parol evidence of intention may suffice to extend the security to subsequent advances (*a*); and generally a verbal agreement to make a subsequent advance, on a deposit of deeds already made for another purpose, is sufficient to constitute an equitable mortgage as to the subsequent advance (*b*).

Interest.

A debt secured by an equitable mortgage, although originating in a simple contract, bears interest from the date of the deposit, even without an express agreement to that effect (*c*).

iii. *Against whom the security prevails.*

Security valid against the Crown.

A deposit of title deeds creates a security valid as against the Crown, if made before the depositor became a Crown debtor by record or specialty (*d*).

Trustee in bankruptcy.

The security is also good against the debtor's trustee in bankruptcy, unless being made so near the bankruptcy as to amount to a fraudulent preference (*e*).

(*u*) *Manningford v. Toleman*, 1 Coll. 670; *Exp. Smith*, 2 M. D. & De G. 587.

(*x*) *Turner v. Letts*, 20 Beav. 185.

(*y*) *Exp. Martin*, 4 D. & C. 457; 2 M. & A. 243.

(*z*) *Exp. Farley*, 1 M. D. & De G. 683, 689.

(*a*) *Exp. Langston*, 17 Ves. 230; *Shepherd v. Titley*, 2 Atk. 348.

(*b*) *Exp. Kensington*, 2 V. & B. 79; *Exp. Whitbread*, 19 Ves. 209.

(*c*) *Re Kerr's Policy*, 8 Eq. 331.

(*d*) *Casberd v. Ward*, 6 Pri. 411.

(*e*) *Exp. Ainsworth*, 3 M. & A. 457.

It also prevails against the interest of a subsequent judgment creditor, although he may have acquired legal seisin under an *elegit* and without notice (*f*). Judgment creditor.

An equitable mortgagee being a purchaser for value, his charge will, by 27 Eliz. c. 4, be effectual against a prior voluntary settlement (*g*). Prior volunteers.

But he is liable to all prior equities affecting the depositor; for instance, as we have seen, a deposit of title deeds given in breach of trust, though without notice, does not affect the claim of the beneficiaries; and where a mortgage was obtained without consideration, and then transferred with notice to a person who deposited it to secure a debt, it was held that the deposittee could not be in a better situation than the depositor, and his security was therefore useless (*h*). Subject to prior equities.

If an equitable mortgagee by deposit carelessly parts with the deeds so as to enable a second mortgage to be made by deposit thereof, he will be postponed to the second mortgagee, since it was through his laches that the fraud was rendered possible (*i*). But a parting with the deeds in the ordinary course of business, as, for instance, to a solicitor, who makes a fraudulent use of them, will not have the effect of postponing the security (*k*). Negligence of deposittee.

iv. *Generally.*

The benefit of an equitable mortgage by deposit may be subsequently extended to persons who were not originally deposittees. If a deposit of deeds is made to a firm, the general supposition is that it is not intended to enure for the benefit of future members of that firm; but if an intention that it should so operate is expressed on the memorandum of deposit, or is proved by parol evidence, Benefit may be subsequently extended.

(*f*) *Whitworth v. Gaugain*, 3 Ha. 416; 1 Ph. 728.

(*g*) *Ede v. Knowles*, 2 Y. & C. Ch. 172.

(*h*) *Parker v. Clarke*, 30 Beav. 54.

(*i*) *Waldron v. Sloper*, 1 Drew. 193.

(*k*) *Re Vernon, Ewens & Co.*, 33 Ch. D. 462.

or is evidenced by continued dealings with the new firm, the new firm may gain the benefit of the security (*l*). The special features of the liens of bankers, &c., are stated elsewhere (*m*).

The rules as to priority, as between equitable mortgagees and others, are fully discussed under the headings of notice, and tacking of mortgages (*n*).

Equitable mortgagee of lease not liable to covenants.

It was formerly supposed that a *cestui que trust* or depository of a lease was liable for the rent and covenants in a suit by the lessor; but the contrary is now clearly established; and the landlord cannot compel him to take, or the mortgagor to execute, an assignment so as to bring him within the liability of the covenants, even if he has been in possession and paid rent (*o*).

III. Remedies of an Equitable Mortgagee.

Foreclosure the proper remedy.

(1.) It has been much discussed whether the proper remedy of an equitable mortgagee is foreclosure (after the analogy of a legal mortgage) or sale (after the analogy of a charge). Prior to the Conveyancing Act, 1881, however, it was settled that in the case of a mortgage of lands the proper remedy was foreclosure (*p*), whether the mortgage arose from an agreement for a legal mortgage (*q*), or from a deposit of title deeds with or without a written memorandum (*r*), or was a mortgage of an equity of redemption (*s*); but if there was a deposit of title deeds,

(*l*) *Exp. Kensington*, 2 V. & B. 79, 83; *Exp. Oakes*, 2 M. D. & De G. 234.

(*m*) p. 294.

(*n*) See pp. 319 *et seq.*, 271 *et seq.*

(*o*) *Moore v. Choat*, 8 Sim. 508; *Moore v. Greg*, 2 De G. & Sm. 304; 2 Ph. 717.

(*p*) *Pryce v. Bury*, 2 Drew. 41;

18 Jur. 967; *James v. J.*, 16 Eq. 153. For form of judgment, see *Lees v. Fisher*, 22 Ch. D. 283.

(*q*) *Frail v. Ellis*, 16 Beav. 350.

(*r*) *Carter v. Wake*, 4 Ch. D. 605, 606, per M. R.; *Backhouse v. Charlton*, 8 Ch. D. 444.

(*s*) *Richards v. Cooper*, 5 Beav. 304.

accompanied by a written agreement for a mortgage, the mortgagee was entitled to either sale or foreclosure (*t*).

By s. 2, sub-s. 6, of that Act (*u*), a mortgage is so defined as to include "any charge on any property securing money or money's worth," terms which clearly comprise an equitable mortgage, and accordingly, by s. 25 of the same Act, the Court is empowered to order a sale instead of foreclosure at the request of the mortgagee, even in the absence of an agreement for a legal mortgage (*r*). But an equitable mortgagee selling under the Act cannot by virtue of s. 21 thereof convey the *legal* estate vested in the mortgagor (*x*).

Where there is a mere charge or lien, the remedy is sale, and not foreclosure (*y*) ; sale is also the proper remedy in the case of a pledge of personal chattels (*z*).

The remedy is sale in case of a charge or pledge of chattels.
Receiver.

An equitable mortgagee is entitled to a receiver, and one may be appointed on motion before defence, and even before appearance in cases where a risk of loss is shown (*a*).

(2.) The remedies of mortgagees (including equitable mortgagees) in bankruptcy, and also in the administration of insolvent estates, and in the winding-up of companies, are now regulated by s. 6 of the Bankruptcy Act, 1883 (*b*). The general principle is that the mortgagee may either give up his security and prove for his whole debt, or retain his security and prove for whatever deficiency there may be.

Under Bankruptcy Act.

(*t*) *York, &c. Co. v. Artley*, 11 Ch. D. 205; *Wade v. Wilson*, 22 Ch. D. 235.

(*u*) 44 & 45 Vict. c. 41.

(*v*) *Oldham v. Stringer*, 33 W. R. 251; *Grissell v. Money*, 38 L. J. Ch. 312.

(*x*) *Re Hodson & Howe's Contract*, 35 Ch. D. 668.

(*y*) *Tennant v. Trenchard*, 4 Ch. 537.

(*z*) *Carter v. Wake*, *sup.*

(*a*) *Aberdeen v. Chitty*, 3 Y. & C. Ex. 379; *Meaden v. Sealey*, 6 Ha. 620.

(*b*) 46 & 47 Vict. c. 52; Jud. Act, 1875, 38 & 39 Vict. c. 77, s. 10.

SECTION IV.—LIENS.

Generally.

- I. *Liens at Law.*
 - II. *Equitable Liens.*
 - 1. *Charges.*
 - 2. *Vendor's Lien.*
Mackreth v. Symmons.
 - 3. *Vendee's Lien.*
-

- Definition. Analogous in many respects to mortgages are those charges of various kinds which are designated by the general term "liens." A lien is not, however, like a mortgage, a *jus in re*, or a *jus ad rem*, but is simply a *right to possess and retain the property subject thereto, until some charge attaching to it is paid or discharged (c)*.
- Liens legal or equitable. Liens are either legal or equitable; that is to say, some liens have always been recognised by the common law; others, apart from recent legislation, could be enforced only in Courts of Equity.
- Specific liens. I. Of liens recognised at law some are specific, others general. It will not be necessary here to do more than briefly indicate some examples of such liens. Familiar
- Artisan. illustrations of specific liens are, the right which an artisan has to retain an article delivered to him to work on until he is paid for the labour expended thereon (*d*); the lien of
- Accountant. an accountant upon books entrusted to him for examination
- Shipowner. and arrangement (*e*); the lien of a shipowner who has paid a sum for salvage, upon the goods on board for the amount

(*c*) Story, 506.(*d*) *Searfe v. Morgan*, 4 M. & W.(*e*) *Exp. Southall*, 17 L. J. Bk.

270.

of contribution to which the owner of the goods is liable (*f*), and the lien of a partner on the partnership property for what may be found due to him on taking the partnership account (*g*). Partner.

A general lien differs from one that is specific in that it entitles the creditor to retain the property in question as a security, not merely for a particular charge, but for the general balance due to him. It has been held that a general lien can only be maintained in particular trades where its existence has been judicially declared (*h*). Lord Mansfield stated that a general lien would be upheld in four cases: (1) where it is an express contract; (2) where it is implied from the usage of trade; (3) where it is implied from the manner of dealing between the parties on the particular case; (4) where the party has acted as a factor (*i*). General liens,
when maintainable.

An important instance of a lien by usage is the lien of a banker over all the bills, papers, and securities of a customer in his hands, which right subsists unless there be an express contract or circumstances showing an implied contract inconsistent with the lien (*k*). An instance of a circumstance showing such an implied contract is the case of a lease being accidentally left with the banker after he had refused to lend money upon it (*l*). Liens by
usage :
Bankers.

A broker has a similar lien (*m*), and an innkeeper has a general lien on articles belonging to his guests which come into his possession as innkeeper (*n*). Brokers.
Innkeepers.

A factor has a general lien on goods consigned to him for sale, and on the purchase-money thereof (*o*), as well as a specific lien on goods bought for the purchase-money Factors.

(*f*) *Briggs v. Merchant, &c. Assoc.*, 18 L. J. Q. B. 178.

(*g*) *Skip v. Harwood*, 2 Swanst. 586.

(*h*) *Bock v. Gopisson*, 6 Jur. N. S. 547; 7 *ib.* 81.

(*i*) *Green v. Farmer*, 4 Burr. 2221.

(*k*) *Davies v. Bowsher*, 5 T. R. 488; *London Chartered Bank v. White*, 4 App. C. 413.

(*l*) *Lucas v. Dorrien*, 7 Taunt. 278.

(*m*) *Hewison v. Guthrie*, 2 Bing. N. C. 755.

(*n*) *Threfall v. Borwick*, 7 L. R. Q. B. 711; 10 *ib.* 210.

(*o*) *Godin v. London Ass. Co.*, 1 Bur. 490; *Robson v. Kemp*, 4 Esp. 236.

Wharfingers. and freight paid in respect thereof (*p*). A wharfinger has also the same general lien as a factor for the balance of his wharfage dues and freight (*q*). As to the liens of auctioneers, warehousemen, packers, and others, see the cases cited below (*r*).

Solicitors' general lien. The lien of a solicitor is of such a nature as to require especial consideration. A solicitor has a general lien on the papers of his client in his hands for his costs, charges, and expenses (*s*); and in consequence thereof every client is entitled to have his costs taxed, though there may be no item in the account relating to an action at law or in equity (*t*). This lien is merely a right to retain, and cannot be actively enforced (*u*). In case of a change of solicitors pending an action, the Court may order the delivery up to the new solicitor of the documents required for the purposes of the action, pending taxation of the ex-solicitor's costs, and without prejudice to his lien (*v*). The lien must not be asserted so as to embarrass the proceedings (*x*). The lien appears not to be waived by an order for payment, or by an attachment for non-payment of costs, nor by any proceeding against the person of the debtor (*y*). It is not confined to deeds and papers, but extends to other articles delivered to the solicitor for the purposes of the action; for instance, to books, shares in a company, &c. (*z*). But it only applies to such deeds and documents as come to his hands in his character as solicitor of the person against whom the lien is claimed (*a*), and it extends only to secure law charges, not including a debt

What it includes.

(*p*) *Exp. Emery*, 2 Ves. sr. 674;
Exp. Good, 3 M. & A. 246.

(*q*) *Naylor v. Mangles*, 1 Esp.
109; 25 & 26 Vict. c. 63, s. 76.

(*r*) *Webb v. Smith*, 30 Ch. D. 192;
Exp. Deeze, 1 Atk. 228; *Re Witt*,
2 Ch. D. 489.

(*s*) *Stevenson v. Blakelock*, 1 M.
& S. 535.

(*t*) *Re Barker*, 6 Sim. 476.

(*u*) *Bozon v. Bollond*, 4 My. & C.
357.

(*v*) *Hutchinson v. Norwood*, 34
W. R. 637; *Bluck v. Lovering*, 35
ib. 232.

(*x*) *Boughton v. B.*, 23 Ch. D.
169.

(*y*) *Lloyd v. Mason*, 4 Ha. 132;
Exp. Bryant, 1 Mad. 49.

(*z*) *Friswell v. King*, 15 Sim. 191;
General Share Trust Co. v. Chap-
man, 1 C. P. D. 771.

(*a*) *Exp. Fuller*, 16 Ch. D. 617.

due on another account (*b*). The lien is available notwithstanding that the claim is statute-barred (*c*).

A solicitor has also, apart from the statute presently to be mentioned, a specific lien on the fund recovered by him in an action for the costs of the action (*d*), and similarly, also, upon money of the client in his hands to abide the result of the action (*e*). But the remedy of a solicitor in such a case has been increased by, and is now dependent on, the statute 23 & 24 Vict. c. 127.

Specific lien on funds recovered.

Previous to 23 & 24 Vict. c. 127, a solicitor had no lien for his costs against *real estate* either at law or in equity. By s. 28 of that Act it is enacted that it shall be lawful for the Court or judge, before whom any suit or matter has been heard, to declare that the solicitor employed therein is entitled to a charge upon the property recovered or preserved by his instrumentality in such suit or matter; and that all conveyances and acts done to defeat such charge shall, unless made to a *bonâ fide* purchaser without notice, be absolutely void and of no effect as against such charge or right. This Act applies to property of all kinds (*f*), and a liberal construction is placed upon the words "recovered or preserved." Thus, the appointment of a receiver of the real estate of an infant has been held to bring the property within the section (*g*). And where the action is for the benefit of all parties, the lien attaches, irrespective of the interest of the client (*h*). The charge is, in fact, in the nature of salvage, and may be made in the interests of persons who did not employ the solicitor and are not parties to the suit, if they adopt the benefit obtained in it (*i*). The Court having declared the lien, will give liberty to apply to have the costs raised by sale or otherwise (*k*).

Lien against real estate, 23 & 24 Vict. c. 127.

(*b*) *Re Galland*, 31 Ch. D. 296.
 (*c*) *Carter v. C.*, 34 W. R. 57.
 (*d*) *Bozon v. Bollond*, *sup.*
 (*e*) *Hanson v. Reece*, 3 Jur. N. S. 1204.
 (*f*) *Birchall v. Pugin*, 10 L. R. C. P. 399.

(*g*) *Baile v. B.*, 13 Eq. 497.
 (*h*) *Bailey v. Birchall*, 2 H. & M. 371.
 (*i*) *Greer v. Young*, 24 Ch. D. 545; *Bulley v. B.*, 8 *ib.* 479.
 (*k*) *Green v. G.*, 26 Ch. D. 16.

By Ord. LXV., r. 14, it is provided (contrary to previous decisions (*l*)), that a set-off for damages or costs between parties may be allowed, notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought. But this power is in the discretion of the Court, and will not be exercised so as to operate unjustly towards the solicitor's rights (*m*).

Securities inconsistent with the lien.

A solicitor who takes a security is considered to have abandoned his lien (*n*); but for this purpose a charging order under the Act is not deemed a security so as to interfere with the lien which he enjoys apart from the Act (*o*).

Change of solicitors.

In the case of a change of solicitors, the lien of the acting solicitor has priority over that of the discharged solicitor (*p*).

II. *Equitable Liens.*

Charges.

1. The most conspicuous and important among equitable liens are those arising from charges of legacies and portions upon real estate. Such liens create a trust which equity will enforce against the person creating the lien, and persons claiming as volunteers or with notice under him. The effect of such charges is more fully considered elsewhere (*q*).

Other instances of liens which do not call for detailed description are the lien of trustees for money properly expended on the trust property (*r*); the lien of a *bonâ fide* possessor in wrongful possession for improvements made under the belief that he was absolute owner (*s*); and a lien by way of salvage, on a policy of assurance, for premiums

(*l*) *Exp. Cleland*, 2 Ch. 803; (*p*) *Rhodes v. Sugden*, 34 Ch. D. 155.
Hamer v. Giles, 11 Ch. D. 942.
 (*m*) *Edwards v. Hope*, 14 Q. B. 922. (*q*) pp. 329 *et seq.*, 529-31.
 (*n*) *Balsh v. Symes*, T. & R. 92. (*r*) *Darke v. Williamson*, 25 Beav. 622.
 (*o*) *De Bay v. Griffin*, 10 Ch. 294, n. (*s*) *Neeson v. Clarkson*, 4 Ha. 97.

paid to keep it on foot, as to which see cases cited below (*t*); from which it appears that a stranger cannot acquire the lien except by virtue of contract, or as trustee, or mortgagee, or by subrogation to the trusts of a trustee.

2. Vendor's lien for unpaid purchase-money.

The lien of a vendor for unpaid purchase-money, and that of a vendee for prematurely paid purchase-money, are among the most important instances of equitable liens, and therefore require detailed investigation. Lien of vendor.

In discussing the application of the well-known equitable principle known as the vendor's lien, it is necessary to distinguish between its operation as between the vendor and purchaser, and as between the vendor and third persons claiming through or under the purchaser. As, however, persons claiming under the purchaser as volunteers are in the same position as himself, the most convenient distribution of the subject is to include volunteers in the first inquiry, and then to consider the extent of the vendor's lien as against those whose title is derived from the purchaser for valuable consideration.

(1.) *As against a purchaser, his heirs, and voluntary assignees.*

The general principle as to the lien of the vendor of an estate is fully expressed in the judgment of Lord Eldon in General principle.

MACKRETH v. SYMMONS,

[15 Ves. 329; 1 W. & T. L. C. 324,]

which is to the following effect: Where a vendor, in compliance with a contract for the sale of an estate, executes a conveyance thereof, but the purchase-money is wholly or partially unpaid, then, notwithstanding that on the face of the conveyance it is expressed to be paid, or that a receipt for it is indorsed thereon, the vendor has a lien on the estate for the money remaining due to him.

The same case further shows that the mere circumstance

(*t*) *Leslie v. French*, 23 Ch. D. 552; *Faleke v. Scottish Imp. Ins. Co.*, 34 *ib.* 234.

of taking an additional security is not inconsistent with the continuance of the lien. The circumstances which are considered to amount to a waiver or abandonment of the lien are hereafter separately discussed.

Applies to copyholds and leaseholds,

not to personal chattels,

The lien applies to copyholds and leaseholds as well as to freeholds (*u*), and attaches when possession of the estate has been delivered to the purchaser, though there has been no conveyance to him (*x*). It does not, however, apply to personal property other than chattels real. As soon as a purchaser has possession (actual or constructive) of such property the lien is gone (*y*). The question of stoppage *in transitu* depends on a different principle, not relevant to the present inquiry.

when consideration is an annuity.

Lien doubtful where there is other security.

Where the consideration for the sale of an estate is in the form of an annuity, the lien attaches to secure the annuity, at least if no other security for that purpose is taken. Where the annuity has been secured by a bond or covenant, the cases have been somewhat conflicting. In the principal case, Lord Eldon held that there was no lien for the annuities; but he did so rather in consideration of the special circumstances of the case than as a general principle of law. In *Tardiffe v. Scrughan* (*z*) the lien was allowed, and this case has never been overruled, though in somewhat similar circumstances some judges have been slow to follow it (*a*). See also in favour of the lien, Sugden, V. & P. 676, ed. 14.

Tardiffe v. Scrughan.

Lien extends to moneys advanced.

If a vendor agrees to lend money to the purchaser for improving the estate, his lien extends to the advances so made, as well as to the purchase (*c*).

Special consideration is required of those cases in which a vendor asserts his lien with respect to a sale to a railway or other company.

(*u*) *Winter v. Anson*, 3 Russ. 492; *Matthew v. Bowler*, 6 Ha. 110.

(*x*) *Smith v. Hibbard*, 2 Dick. 730.

(*y*) 15 Ves. 344; *Exp. Gwynne*, 12 Ves. 383.

(*z*) 1 Bro. C. C. 423.

(*a*) *Clarke v. Boyle*, 3 Sim. 502; *Buckland v. Pocknell*, 13 Sim. 412.

(*c*) *Exp. Linden*, 1 M. D. & De G. 435.

As a general rule, the lien attaches to lands purchased by such companies, whether by agreement or in the exercise of compulsory powers (*d*); and it includes unpaid compensation as well as purchase-money, unless such compensation is the subject of a separate agreement. Although a railway may have been made over the land, the lien may be enforced by sale (*e*); but not by an injunction restraining the use of the railway (*f*). Where, however, the consideration for the purchase is a rent-charge on the lands, there is no lien for securing its payment (*g*), but the owner of the rent-charge is entitled to a receiver of the tolls and net earnings of the undertaking, and may distrain on the lands (*h*).

Lien as against railway and other companies generally.

Where the consideration is a rent-charge.

A vendor's lien is so far regarded as an interest in land as to be within the Mortmain Act (*i*), and a bequest of money due thereupon is therefore void (*k*); and it seems that a mere parol assignment of it would be ineffectual, as within the Statute of Frauds, unless accompanied by a deposit of title deeds (*l*). The lien, however, is not such an interest in land as to come within s. 23 of the Wills Act (*m*). So, if, after devising an estate, the deviser contracts to sell it, the purchase-money will belong to the personal representatives, and not to the devisee (*n*).

Lien within the Mortmain Act, and Statute of Frauds;

but not an interest in land within Wills Act.

A vendor's lien not being an express trust, the right to enforce it may be barred by the Statute of Limitations at the end of twelve years (*o*), unless the case is taken out of the operation of the statute by a sufficient acknowledgment (*p*).

Lien barred by Statute of Limitations.

(*d*) *Walker v. Ware, &c. Co.*, 1 Eq. 195.

(*e*) *Cosens v. Bognor, &c. Co.*, 1 Ch. 594; *Munns v. I. of Wight R. Co.*, 5 Ch. 414.

(*f*) *Pell v. Northampton, &c. R. Co.*, 2 Ch. 100; but see *Allgood v. Merrybent, &c. R. Co.*, 55 L. J. Ch. 743.

(*g*) *E. of Jersey v. Briton, &c. Dock Co.*, 7 Eq. 409.

(*h*) *Eyton v. Denbigh, &c. Co.*, 6 Eq. 14.

(*i*) 9 Geo. II. c. 36.

(*k*) *Harrison v. H.*, 1 R. & M. 71.

(*l*) *Dryden v. Frost*, 3 My. & Cr. 670; *Meux v. Smith*, 11 Sim. 421.

(*m*) 1 Vict. c. 26.

(*n*) *Farrar v. E. of Winterton*, 5 Beav. 1. But see *Drant v. Fause*, 1 Y. & C. Ch. 580.

(*o*) 3 & 4 Will. IV. c. 27; 37 & 38 Vict. c. 57.

(*p*) *Toft v. Stephenson*, 1 De G. M. & G. 28; 5 *ib.* 735.

Not within
17 & 18 Vict.
c. 113,

but included
in amending
Acts.

A vendor's lien was held not to be a mortgage within Locke King's Act (*q*), so that the personal estate of a deceased purchaser was primarily liable for the payment of the purchase-money (*r*); but by 30 & 31 Vict. c. 69, the word "mortgage" was declared to include any lien for unpaid purchase-money upon any lands purchased by a testator; and by 40 & 41 Vict. c. 34, the same construction was applied in case the purchaser died intestate.

(2.) *As against purchasers for value.*

Whom the
lien binds.

The equitable lien for unpaid purchase-money binds the estate, as well in the hands of persons claiming for valuable consideration under the purchaser *with notice*, as in the hands of the purchaser himself, his heirs, and voluntary assignees (*s*); but the lien will not prevail against a *bonâ fide* purchaser who buys without notice that the purchase-money remains unpaid, and acquires the legal estate (*t*). If, however, the legal estate is outstanding, then, as the second purchaser has only an equitable interest subsequent in time to the equitable lien, the equitable lien will have precedence, conformably to the maxim "*Qui prior est tempore potior est jure*" (*u*). But this again is subject to modification, since priority in time will not avail unless the equities are equal. If, therefore, the vendor has been guilty of negligence, he may lose his lien. Thus, in *Rice v. Rice* (*x*), certain leaseholds were assigned to a purchaser by a deed which recited the payment of the whole of the purchase-money, and had the usual receipt indorsed on it; the title deeds were delivered up to the purchaser, but the whole of the purchase-money was, in fact, not paid. The purchaser forthwith deposited the assignment and title deeds to secure an advance. It was held that the equity arising from the deposit ought to prevail against the lien,

Lien may be
lost by negli-
gence.

(*q*) 17 & 18 Vict. c. 113.

(*r*) *Hood v. H.*, 3 Jur. N. S. 684.

(*s*) *Walker v. Preswick*, 2 Ves.
622; *Winter v. Anson*, 3 Russ. 488;
1 S. & S. 434.

(*t*) *Cator v. E. of Pembroke*, 1 Bro.
C. C. 302.

(*u*) *Frere v. Moore*, 8 Pri. 475.

(*x*) 2 Drew. 73.

on the ground that the vendor had, by his negligence, placed it in the power of the purchaser to deal with the estate as absolute owner at law and in equity. The principle of this case is now embodied in s. 55 of the Conveyancing Act, 1881, which enacts that "a receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof."

C. A. 1881.

Receipt clause.

The results are:—

i. That the lien prevails against a second purchaser with notice, even though he acquires the legal estate; and as against a purchaser without notice, if the legal estate is outstanding, and the vendor has not been guilty of negligence.

ii. That the lien does not prevail against a *bonâ fide* purchaser who acquires the legal estate without notice; nor against a purchaser of an equitable interest, where the first vendor has been guilty of negligence. Or perhaps it may be said still more generally that the lien will not prevail against a subsequent equitable mortgagee who strengthens his equity by acquiring possession of the title deeds (y).

The force of the lien being thus in a great measure dependent upon the question of notice, we may here add some illustrations, especially touching this class of cases, of what does and does not constitute notice, though this subject is more fully considered elsewhere (z).

What amounts to notice.

Where a subsequent purchaser or mortgagee omits to make inquiries for the title deeds of the property in question, or accepts an insufficient excuse for their absence, the

Omission to inquire for title deeds.

(y) *Clarke v. Palmer*, 21 Ch. D. 124. (z) See p. 319 *et seq.*

Court will impute to him the knowledge which such inquiry would have imparted, and will enforce against him any prior claim, the existence of which such inquiry would have discovered (*a*), although he may acquire the legal estate (*b*). Not so, however, if he has made inquiry, and a reasonable excuse has been given for the non-appearance of the deeds (*c*).

Under the Middlesex Registry Act, and the former Yorkshire Registry Act, registration of a vendor's lien was not required, and gave no priority (*d*); but by the Yorkshire Registry Acts of 1884 and 1885 (*e*), no lien has any effect or priority, as to lands in Yorkshire, as against any purchase or mortgage deed duly registered, and, in the absence of fraud, priority of registration determines priority of title. These Acts only apply to liens arising on or after the 1st of January, 1885; and they do not apply to copyholds.

Recitals.

A recital showing that the title is deduced from the first vendor, but not showing that the purchase-money has not been paid, is not sufficient to affect a purchaser with notice (*f*).

Trustee in bankruptcy bound.

The trustee in bankruptcy of a purchaser will be affected by the lien of a vendor, though he may have had no notice, since he takes subject to all equities attaching to the bankrupt (*g*).

(3.) *What amounts to waiver or abandonment of the lien.*

Lien not waived by taking a security *ipso facto*.

We have seen that the mere fact of the vendor taking an additional security for his money is not *per se* a waiver of his lien. Lien depends on an implied contract, and the question is, whether from the circumstances of the case the Court will infer that the lien was intended to be reserved,

(*a*) *Nat. Prov. Bank v. Jackson*, 33 Ch. D. 1.

(*b*) *Worthington v. Morgan*, 16 Sim. 547; *Peto v. Hammond*, 30 Beav. 495.

(*c*) *Allen v. Knight*, 5 Ha. 272; *Hewitt v. Loosmore*, 9 Ha. 449.

(*d*) 7 Anne, c. 20; *Kettlewell v. Watson*, 21 Ch. D. 685; 26 *ib.* 501.

(*e*) 47 & 48 Vict. c. 54; 48 & 49 Vict. cc. 4, 26.

(*f*) *Cator v. E. of Pembroke*, 1 Bro. C. C. 302.

(*g*) *Exp. Hanson*, 12 Ves. 349.

or that the intention was to give credit exclusively to the person from whom the security was taken.

The general rule is that although the mere taking of a bond, bill, promissory note, or covenant for the purchase-money will not destroy the lien, yet where it appears that the bond, note, or covenant was *substituted* for the consideration money, and was in fact the thing bargained for, the lien ceases to exist. In other words, if the consideration for which the estate is sold is the bond, note, or covenant, then on the giving of this security, the vendor gets all that he bargained for, the transaction is complete, and he cannot thereafter assert a lien. It is evident that as a rule the intention of the vendor is not by taking one security to lose another. It requires, therefore, clear evidence to show that a lien was not intended (*h*). An express agreement is, however, not required, and a few illustrations will serve to indicate what acts short of that will be considered sufficient for the purpose.

Where there was a stipulation that payment of the purchase-money should be deferred until a certain time after a re-sale of the property, the vendor was considered to have abandoned his lien (*i*). The lien has, however, been given effect where the purchase-money was payable by instalments (*k*).

It is a question of intention.

What amounts to sufficient indication of intention to waive the lien.
Deferred payment.
Mortgage of other lands.

A mortgage of other lands for the whole or part of the purchase-money (*l*), or a mortgage of the purchased estate for part of the purchase-money, permitting the rest to remain on personal security, has been thought sufficient to discharge the lien—in the first instance wholly, in the second to the extent of the money remaining on the personal security (*m*). The former of these cases was, however, not considered conclusive by Lord Eldon in *Mackreth v. Symmons* (*n*), and it would seemingly be

(*h*) 15 Ves. 341; *Frail v. Ellis*, 16 Beav. 350.

(*i*) *Exp. Parkes*, 1 G. & J. 228.

(*k*) *Nives v. N.*, 15 Ch. D. 649.

(*l*) *Nairne v. Prowse*, 6 Ves. 752.

(*m*) *Bond v. Kent*, 2 Vern. 281; *Capper v. Spottiswoode*, Taml. 21.

(*n*) 15 Ves. 329.

necessary to look further at the whole circumstances of the case (*o*).

Suffering one trustee to retain purchase-money.

If a vendor, knowing the purchase-money to be trust money, suffers one of the trustees to retain part of it without the knowledge of the co-trustees or the *cestui que trust*, he has no lien for the part so retained (*p*). Where, again, the vendor, without receiving the purchase-money, executes a conveyance for the purpose of enabling the purchaser to execute a mortgage, he will lose his lien as against the mortgagee (*q*). These cases, are, however, rather illustrative of the loss of the lien by negligence than of its intentional waiver.

Slight evidence sufficient where consideration is an annuity.

We have already seen that where the consideration for the purchase is an annuity, slighter evidence will suffice to show an intention to abandon the lien than in other cases; if it may not even be said that in these circumstances the presumption is against the lien.

Vendor may not enforce his lien and collateral securities together.

A vendor, herein differing from a mortgagee, cannot proceed to enforce his lien and his collateral securities at the same time (*r*); and he will be postponed to a mortgage of the estate made to secure a part of the purchase-money advanced by such mortgagee, if he is an assenting party to the mortgage (*s*).

(4.) *Marshalling for lien.*

Marshalling.

The general principles of marshalling are expounded elsewhere (p. 542 *et seq.*), and it is therefore only necessary here to refer to its application in the particular case of a lien.

Lien thrown on the purchased estate.

Following the rule that if one person has two funds to which he may resort, he shall not disappoint another person who can only resort to one of the funds, the Court will, in the event of the death of the vendee, marshal the

(*o*) *Saunders v. Leslie*, 2 Ba. & Be. 509.

(*p*) *White v. Wakefield*, 7 Sim. 401.

(*q*) *Smith v. Evans*, 28 Beav. 59.

(*r*) *Nairne v. Prowse*, 6 Ves. 752; *Barker v. Smart*, 3 Beav. 64.

(*s*) *Cood v. Pollard*, 9 Pri. 544; 10 *ib.* 109.

assets in favour of third persons, so as in case of necessity to compel the vendor to resort to the purchased estate for his money (*t*). At one time it was thought that to do this would be to invade the Statute of Frauds, but it is now well established that, as well in favour of legatees as of creditors, the principle of marshalling will be applied. Legatees, however, can, of course, in this, as in other cases, demand the benefit of marshalling only against those whose claim is weaker than their own—*e.g.*, against the heir taking by descent—not against devisees, who are as much an object of bounty as themselves (*u*). Against heir.

3. Vendee's lien for prematurely paid purchase-money.

Quite analogous to the lien of a vendor on the estate for unpaid purchase-money is the lien of the purchaser in case he has paid the purchase-money or any part of it prematurely, as, for instance, by way of deposit. If the contract is after such payment rescinded, or cannot be enforced owing to want of title in the vendor, or is for any proper reason disclaimed by the purchaser, he has a lien on the estate in the hands of the vendor for the money so paid, with interest thereon, and for his costs (*x*). Vendee's lien generally analogous.

The principles applicable to a vendor's lien are equally so here. Thus the taking of another security for the money is not inconsistent with the lien (*y*); it obtains not only against the vendor, but against a subsequent mortgagee who has notice of the payments having been made (*z*); and there is no lien where the contract goes off through the purchaser's own default (*a*).

If the first purchaser of an estate sells the estate while subject to a lien for prematurely paid purchase-money, and the second purchaser also pays his purchase-money prematurely, and afterwards the first contract goes off, the Sale of land subject to the lien.

(*t*) *Trimmer v. Bayne*, 9 Ves. 209; Ch. 118.
Sproule v. Prior, 8 Sim. 189. (*y*) *Wythes v. Lee*, *sup.*
(*u*) *Wythe v. Henniker*, 2 My. & K. 635. (*z*) *Rose v. Watson*, 10 H. L. 672.
(*x*) *Wythes v. Lee*, 3 Drew, 396; (*a*) *Dinn v. Grant*, 5 De G. & Sm. 451.
Torrance v. Bolton, 14 Eq. 124; 8

second purchaser then has a lien upon the first purchaser's interest—that is, a lien upon the sum for which the first purchaser has a lien (*b*).

If the vendor is a mortgagee selling under a power of sale, the purchaser's lien attaches only upon the interest of the mortgagee, not to the prejudice of the mortgagor (*c*); but it may affect the interest of persons for whom the mortgagee is a trustee (*c*).

(*b*) *Aberaman Iron Works v. Wickens*, 4 Ch. 101. (*c*) *Wythes v. Lee*, 3 Drew. 396.

SECTION V.—EQUITABLE PRINCIPLES PARTICULARLY
AFFECTING MORTGAGES AND SALES.

I. *Notice.*

1. *Definition.*

(1.) *Actual Notice.*

(2.) *Constructive Notice.*

2. *Effects of Notice.*

3. *Matters analogous to Notice.*

II. *Defence of Purchase for Value without Notice.*

1. *Where Defendant has Legal Estate.*

2. *Where Legal Estate is outstanding.*

3. *Where Plaintiff has Legal Estate.*

4. *Active Relief to bonâ fide Purchaser.*

III. *Liability of Purchasers for Application of Purchase-money.*

1. *As to Personalty.*

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3. *Statutory Modifications.*

IV. *Assignment of Possibilities and Choses in Action.*

1. *Contrast of Law and Equity.*

Warmstrey v. Tanfield.

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2. *Notice.*

3. *Assignee subject to Equities.*

4. *Judicature Act, s. 25, sub-s. 6.*

5. *Unlawful Assignments.*

I. *Notice.*

1. *Definition.*

By the term "Notice" is meant the transmission to the party under consideration of certain information (*notitia*)

respecting facts, directly or indirectly affecting his rights or liabilities, as viewed by a Court of equity, in relation to certain property.

Notice actual
or construc-
tive.

Notice is either actual or constructive.

Actual notice.

(1.) Actual notice, or, in other words, express notice, is a term sufficiently clear to need no explanation. It may be either written or oral (except in cases in which a written notice is stipulated for). Vague reports from persons not interested in the property do not, however, amount to notice; nor do mere general assertions that some other persons claim a title (*e*). But knowledge of the facts which is sufficient to operate on the mind of a man of business, may amount to notice although it may be acquired accidentally and not by means of a formal communication (*f*).

Constructive
notice.

(2.) Constructive notice is nothing other than evidence of notice so strong that the Court will act upon it in the absence of contradiction (*g*).

Constructive notice, like constructive fraud, indicates that the presumption of certain facts is so strong that it cannot be safely ignored, although the actual fact (in this case the transmission of the information) may be unsupported by positive evidence. A clear conception as to this can only be reached by means of illustration, and this will be facilitated by the following classification.

Notice of a
fact, notice of
its causes.

i. *Notice of a fact is notice of its causes*; or, in other words, where there has been actual notice of a fact which would have the effect of putting a reasonable person upon further inquiry, the result will be constructive notice of other facts which would be elicited by such inquiry. The Conveyancing Act, 1882 (*h*), expresses the principle thus: "a purchaser shall not be prejudicially affected by notice" of any interest, fact, or thing, unless it is within his own

(*e*) *Jolland v. Stainbridge*, 3 Ves.
478.

(*f*) *Lloyd v. Banks*, 3 Ch. 488;

Arden v. A., 29 Ch. D. 702.

(*g*) *Plumb v. Fluit*, 2 Anst. 438.

(*h*) 45 & 46 Vict. c. 39, s. 3.

“knowledge or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made.”

(a) The simplest illustration of this is where a purchaser is informed that the legal estate is in a third person. He is then bound to inquire the reason; and if he does not, he will, nevertheless, be presumed to know the circumstances which have occasioned it, or the terms of a trust attached to the legal estate (*i*). Similarly, actual notice that the title deeds are in the hands of another man will in general be constructive notice of any charge which he may have thereon (*k*). If, however, in such a case a *bond fide* inquiry is made for the deeds, and the purchaser is then deceived and put off by a plausible and reasonable excuse for their absence, constructive notice will not be imputed to him (*l*). The Court will clearly impute fraud or gross and wilful negligence in a case where after such notice the purchaser omits all inquiries (*m*). Where the title deeds are in the possession of a solicitor, this does not amount to a constructive notice of the solicitor's lien thereupon, since such possession is ordinary in the course of business, and as a rule the possession is the cause of the lien, rather than the lien the cause of the possession (*n*).

Notice that legal estate is outstanding,

or that the title deeds are held by a third person.

(b) Any marked peculiarity in a deed—for instance, the absence or peculiar position of a receipt clause—is considered sufficient to put a person upon inquiry; and if it proves to be connected with the circumstances for which the deed might be set aside, it will be held constructive notice of such circumstances (*o*). It will not, however, be constructive notice of other irregularities in the trans-

Peculiarities in deeds.

(*i*) *Anon.*, Freem. 137.

(*k*) *Birch v. Ellames*, 2 Anst. 427; *Maxfield v. Burton*, 17 Eq. 15.

(*l*) *Hewitt v. Loosemore*, 9 Ha. 449; *Exp. Hardy*, 2 D. & C. 393; *Manners v. Mew*, 29 Ch. D. 725.

(*m*) *Worthington v. Morgan*, 16 Sim. 547.

(*n*) *Nat. Prov. Bank v. Jackson*, 33 Ch. D. 1.

(*o*) *Kennedy v. Green*, 3 My. & K. 699.

action (*p*). In connexion with this, it must be remembered that now it is sufficient that the receipt clause be either contained in the deed *or* indorsed thereon. In either case it is, in favour of a subsequent purchaser not having notice that the consideration was not in fact paid or given, sufficient evidence of the payment (*q*).

Occupation
by third
person.

(*c*) As a general rule, if a person purchases an estate which he knows to be in the occupation of another than the vendor, the fact of such occupation is sufficient to put him upon inquiry. He will therefore be presumed to be aware of and will be bound by all equities which such occupier may have in the land. The purchaser has, in short, actual notice of a fact affecting the property and constructive notice of the circumstances which give rise to it. If the tenancy is under a lease, he will be held to have notice thereof, and of its contents (*r*). If the tenant in possession has entered into a contract for the purchase of the estate, a subsequent purchaser will be held to have notice of the contract (*s*). If two persons are together carrying on business on the property, their possession is constructive notice of the title of the partnership (*t*). The same notice is not, however, implied as between the vendor and purchaser while the matter is still in contract; that is to say, though the subsequent purchaser, if he completes his contract, is bound by the equities of the previous purchaser, he cannot be compelled by the vendor to complete a contract which he had entered into in ignorance of those equities, on the ground that the possession was constructive notice thereof (*u*). It is plain that an innocent first incumbrancer does not stand on the same footing as a vendor, who is under at least a moral obligation to make full disclosure of any burdens on the property of which he is negotiating a sale.

(*p*) *Greenslade v. Dane*, 20 Beav. 284.

(*q*) 44 & 45 Vict. c. 41, ss. 54, 55.

(*r*) *Taylor v. Stibbert*, 2 Ves. jr. 437, 440.

(*s*) *Daniels v. Davison*, 16 Ves. 249; 17 Ves. 433.

(*t*) *Cavander v. Bulteel*, 9 Ch. 79.

(*u*) *Caballero v. Henty*, 9 Ch. 447.

On the same principle, actual notice that an occupier holds as a tenant of a particular person is constructive notice of the title of the latter (*x*); and actual notice that the tenants pay their rents to a particular person is constructive notice of the terms of their tenancy (*y*). Actual notice of tenancy.

(*d*) The visible appearance of the property in question may be such as to put a purchaser upon inquiry, thus amounting to constructive notice of certain rights respecting it. Thus the fact that there were fourteen chimney-pots upon a house in which there were only twelve flues was held to amount to constructive notice of an easement for the passage of the smoke of an adjoining owner (*z*). The existence of an archway was considered notice of a right of way under it (*a*); and the existence of a sea-wall, notice of an obligation for its maintenance and repair (*b*). The existence of windows is not, however, constructive notice of an agreement giving a right to the access of light to them, since windows are frequently made where they are liable to be obstructed, the builder being content to take his chance of acquiring a right by prescription (*c*). Visible appearance of property.

ii. *Notice of a deed is notice of its contents.*

Notice of a deed is notice of its contents.

It is immaterial whether from the description of the parties, or from the recitals or from any other part of the deed, the purchaser would be enabled to discover an interest prior to his own. He must be presumed to be acquainted with the whole contents, and therefore with other deeds to which it necessarily refers (*d*). Thus a conveyance by persons interested as devisees is notice of the will by which they claim (*e*); notice of a lease is notice of the covenants therein (*f*); and this, notwithstanding

(*x*) *Bailey v. Richardson*, 9 Ha. 734.

(*y*) *Knight v. Bowyer*, 2 De G. & J. 421.

(*z*) *Hervey v. Smith*, 22 Beav. 299.

(*a*) *Davies v. Sear*, 7 Eq. 427.

(*b*) *Morland v. Cook*, 6 Eq. 252.

(*c*) *Allen v. Seckham*, 11 Ch. D. 790.

(*d*) *Bisco v. E. of Banbury*, 1 Ch. Ca. 287; *Coppin v. Fernyhough*, 2 Bro. C. C. 291; *Davies v. Thomas*, 2 Y. & C. Ex. 234.

(*e*) *Burgoyne v. Hatton*, Barn. Ch. Rep. 237.

(*f*) *Taylor v. Stibbert*, *sup.*

that by the Vendor and Purchaser Act, 1874, a lessee is not entitled to look into his lessor's title without an express stipulation for that purpose. If he chooses to remain in an ignorance which he might have avoided he must take the consequences (*e*). An agreement for a purchase of a lease does not, however, so affect the purchaser with constructive notice of unusual and onerous covenants contained therein as to render him liable to complete the purchase in spite thereof, unless before the agreement he had a fair opportunity of ascertaining the terms of the covenants (*f*).

A person is not, however, presumed from one deed to have notice of another referred to therein which does not necessarily affect the property in question, and which he is told does not affect it (*g*). Where in particulars of sale there is a bare reference to a deed which the purchaser can inspect, he will be bound by its contents: but if the vendor purports to state what the contents are, the purchaser may reasonably rely thereupon, and will not be affected by any inaccuracies in the vendor's statement (*h*).

iii. *Actual notice to an agent is constructive notice to his principal.*

Notice to agent is notice to principal.

It is well established that notice to the agent, solicitor, or counsel of a purchaser is constructive notice to himself (*i*); and the same rule applies though the same person may act as agent of both vendor and purchaser (*k*).

Limitation of this principle.
C. A. 1882.

Notice must be in the same transaction,

As to this species of constructive notice, the Conveyancing Act, 1882, provides that notice is not to prejudice a purchaser unless in the same transaction with respect to which the question arises, it has come to the knowledge of his counsel as such, or of his solicitor or other agent as such, or would have come to the knowledge of his solicitor

(*e*) *Patman v. Harland*, 17 Ch. D. 353.

(*f*) *Reeve v. Berridge*, 20 Q. B. D. 523; *Hyde v. Warden*, 3 Ex. D. 72.

(*g*) *Jones v. Smith*, 1 Ha. 43; *Williams v. W.*, 17 Ch. D. 443.

(*h*) *Cox v. Coventon*, 31 Beav. 378.

(*i*) *Sheldon v. Cox*, 2 Ed. 228; *Newstead v. Serles*, 1 Atk. 265.

(*k*) *Fuller v. Bennet*, 2 Ha. 402; *Tweedale v. T.*, 23 Beav. 341.

or other agent as such if such inquiries and inspections had been made as ought reasonably to have been made (*l*).

This limitation of the doctrine to cases in which the notice was given in the same transaction relieves purchasers from a liability which was dangerous as the law previously stood. It is to be observed further that the notice, in order to be imputed to the principal, must be notice of facts material to the question at issue, and such as it is the duty of the agent to communicate (*m*). The employment of a solicitor to do a merely ministerial act, such as to procure the execution of a deed, does not so constitute him an agent as that notice to him shall be constructive notice to his employer (*n*).

and of material facts.

Solicitor employed only ministerially.

If a solicitor acting for both parties is guilty of a concealment from one of them with the cognisance of the other, the former is not affected with constructive notice (*o*), nor if he is himself the author of a distinct fraud in the same transaction is his knowledge thereof imputed to the employer (*p*), since it is not to be presumed that the solicitor would make a disclosure of such a fact (*q*). The mere fact of his having been guilty of fraud at some other time in respect of the same property will not prevent the imputation of his knowledge in accordance with the ordinary rule (*r*).

Solicitor guilty of fraudulent concealment.

2. *Effects of Notice.*

(1.) A purchaser for value without notice is, as we have seen, in many respects favoured in equity. It is well established that a person who purchases an estate after notice of a prior equitable right makes himself a *mala fide* purchaser, and will not be able to defeat the prior right by getting in the legal estate for his protection. On the contrary, he will be held a trustee for the benefit of the person

(*l*) 45 & 46 Vict. c. 39, s. 3.

(*m*) *Wyllie v. Pollen*, 32 L. J. Ch. N. S. 782.

(*n*) *Wyllie v. Pollen*, *sup.*; and see *Re Cousins*, 31 Ch. D. 671.

(*o*) *Sharpe v. Foy*, 4 Ch. 35.

(*p*) *Kennedy v. Green*, 3 My. & K. 699; *Cave v. C.*, 15 Ch. D. 639.

(*q*) *Waldy v. Gray*, 20 Eq. 238.

(*r*) *Atterbury v. Wallis*, 8 De G. M. & G. 454; *Boursot v. Savage*, 2 Eq. 134.

whose right he sought to defeat; and he secures no better position than that of the person who conveys to him (*s*).

Perhaps the most frequent illustrations of the principle are afforded by cases in which a person purchases, or takes a legal mortgage of an estate with notice of a prior equitable mortgage by deposit of title deeds (*t*), or of a prior equitable lien for unpaid purchase-money (*u*), and those cases in which a person purchases with notice of a trust (*x*).

Effect of
registration.

(2.) It is established that where registration is required an earlier registration will not, in the absence of express statutory enactment to that effect, suffice to gain priority in the face of notice of the unregistered deed (*y*). But if the second transaction was without notice at its inception, priority may then be gained by a registration made after knowledge of the earlier unregistered, or defectively registered, deed has been acquired (*z*). Registration, moreover, under the English Acts (excepting the Yorkshire Registries Act, 1884), is not of itself notice; so that a prior equitable incumbrance will not, though registered, affect a subsequent purchaser without notice who obtains the legal estate (*a*). The Irish Registration Act (*b*) is differently framed, and expressly gives priority to instruments in the order of their registration (*c*).

Registration
not notice.

Secus in
Ireland.

Purchase
with notice
from a person
without
notice.

(3.) Where a person purchases for valuable consideration, but with notice of a prior charge, from a person who acquired his interest without notice of it, he may protect himself behind the *bona fides* of the first purchaser (*d*). At first sight this seems inconsistent with the principle

(*s*) *Potter v. Sanders*, 6 Ha. 1;
Re A. D. Holmes, 29 Ch. D. 786.

(*t*) *Birch v. Ellames*, 2 Anst. 427.

(*u*) *Mackreth v. Symmons*, 15 Ves.
349.

(*x*) *Dunbar v. Tredinnick*, 2 Bull.
& B. 319.

(*y*) *Le Neve v. Le N.*, Amb. 436;
but see now, Yorkshire Registries
Act, *sup.* p. 304.

(*z*) *Elsey v. Lutyens*, 8 Ha. 159;
Essex v. Baugh, 1 Y. & C. Ch. C.
620.

(*a*) *Morecock v. Dickens*, Amb.
678.

(*b*) 6 Anne, c. 2.

(*c*) *Bushell v. B.*, 1 S. & L. 98.

(*d*) *Lowther v. Gordon*, 2 Atk.
242.

that personal *mala fides* disentitles to protection; but it is evident that if it were otherwise the first *bonâ fide* purchaser would be the sufferer, inasmuch as he would be unable to get full value for the property which he innocently acquired.

Conversely, if a person who has notice sells to a *bonâ fide* purchaser who has no notice, and the latter secures the legal title, he is protected against a prior charge (e).

Purchase without notice from a person who has notice.

If, however, a merely equitable interest is dealt with in this case, the result is different, since persons purchasing equitable interests take them subject to all equities affecting them. The assignor cannot give the assignee any greater interest than he himself has—namely, an interest subject to the charge of which he had no notice (f).

(4.) Notice before actual payment of the purchase-money is sufficient to bind a purchaser, as efficiently as notice previous to his contract, for this gives him an opportunity of rescinding his contract in equity (g). And conversely, notice before the execution of the conveyance is binding, although the purchase-money may have been paid before notice, for the purchaser may secure himself by retaining the legal estate (h).

Notice effectual if before payment or conveyance.

3. *Matters analogous to notice.*

(1.) The registration of an action as a *lis pendens* is binding on subsequent purchasers, taking effect from the date of service of the writ (i). The statement of a special case amounts to a *lis pendens*, and is binding when registered. Re-registration every five years is necessary (k).

The principle applies as well to dealings of the plaintiff as to those of the defendant. Neither party may alien the

(e) *Harrison v. Forth*, Prec. Ch. 51.

(f) *Ford v. White*, 16 Beav. 120; *Harpham v. Shacklock*, 19 Ch. D. 207.

(g) *Tourville v. Naish*, 3 P. Wms. 307.

(h) *Wigg v. W.*, 1 Atk. 382; *Sparke v. Foy*, 4 Ch. 35.

(i) *B. of Winchester v. Payne*, 11 Ves. 197; *Schofield v. Solomon*, 52 L. T. 679.

(k) 2 & 3 Vict. c. 11, s. 7.

Effect of. property in dispute to the prejudice of the other (*l*). It is necessary, however, that some specific claim should have been made in the suit to the particular property in question (*m*). Thus, an action for a general account does not bind all the real and personal estate to which it relates (*n*). A *lis pendens*, again, does not create a charge or lien upon the property; it merely puts a purchaser upon an inquiry as to the validity of the plaintiff's claim (*o*).

Registration of deeds. (2.) It has been seen that the registration of deeds is not constructive notice so as to affect a purchaser taking the legal estate (*p*); but if a purchaser search the register he will be presumed to have notice thereof, unless he can show that the search did not extend to the time of the actual registration (*q*). Similarly, under the former law, judgments were not notice unless a search had actually been made (*r*). By 23 & 24 Vict. c. 38, it was enacted that no judgment, statute, or recognisance should affect any land as to a *bonâ fide* purchaser for value, although with actual notice, unless a writ of execution was issued within three months of the registration; and now, by 27 & 28 Vict. c. 112, no judgment, statute, or recognisance affects any land until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority.

Provision is made by the Conveyancing Act, 1882 (*s*), for the making of official searches, on the request of a purchaser or other interested person, for judgments, deeds, *lites pendentes*, and other matters affecting title: and the official certificate given is conclusive in favour of a purchaser, as against persons interested under or in respect of such judgments, deeds, &c. (*t*).

(*l*) *Bellamy v. Sabine*, 1 De G. & J. 566, 580.

(*m*) *Holt v. Dewell*, 4 Ha. 446.

(*n*) *Walker v. Flomstead*, 2 Ld. Ken., pt. 2, 57, 59; *Exp. Thornton*, 2 Ch. 176.

(*o*) *Bull v. Hutchens*, 32 Beav. 615.

(*p*) See *Bushell v. B.*, 1 S. & L.

103.

(*q*) *Hodgson v. Dean*, 1 S. & S. 221.

(*r*) *Lane v. Jackson*, 26 Beav. 535.

(*s*) 45 & 46 Vict. c. 39, s. 2.

(*t*) See also for searches under Yorkshire Registries Act, 47 & 48 Vict. c. 54, s. 20.

II. *Defence of Purchase for Value without Notice.*

A general rule laid down in the important case of

General rule.

BASSET v. NOSWORTHY

[Rep. t. Finch, 102; 2 W. & T. L. C. 1]

is that equity will give no assistance to the legal title against a *bonâ fide* purchaser without notice of an adverse title.

Three cases may arise in which a defendant may plead that he is a purchaser for valuable consideration without notice. Either the plaintiff in equity may have an equitable title, and may seek the assistance of the Court to establish it against a defendant who has secured the legal estate; or the legal estate may be outstanding, and the parties before the Court set up conflicting equitable interests; or the plaintiff may himself have the legal estate, and may be seeking to add to it the equitable interest as well.

1. *Where the defendant has the legal estate.*

No maxim is better known than that "*where the equities are equal the law shall prevail.*" Acting in conformity with this rule, Courts of equity will uniformly acknowledge the defence of a defendant who has the legal estate, and who pleads that he is a purchaser for value without notice. It will in such a case refuse to assist the plaintiff, but will leave the parties to the position in which the law places them (*u*). This may be thus illustrated:—A., the owner of an estate, contracts to sell it to B., and B. pays a part of the purchase-money before the estate is legally conveyed to him. A. then sells the estate to C., who has no knowledge of the transaction with B.; C. pays his purchase-money, and the estate is legally conveyed to him. If, then, B. comes into equity to seek to enforce against the estate

Where defendant has legal estate equity will not relieve.

(*u*) *Pileher v. Rawlins*, 7 Ch. 259.

the lien to which as a purchaser equity would under other circumstances have held him entitled, the relief will be refused to him. It will be held that C. has as good a right in conscience to the full enjoyment of his estate as B. has to security for his prematurely paid purchase-money; equity, therefore, will refuse to interfere with the advantage which he derives from his legal position.

Legal estate
subsequently
acquired.

If the defendant who pleads his *bonâ fide* purchase for value without notice has not secured the legal estate at the time of his purchase, but has subsequently acquired it, his plea is equally good; and this notwithstanding that in the interval between his purchase and his acquiring the legal title he may have had notice of the prior transaction of the plaintiff (*x*). His own equity being equal to the plaintiff's, he will not be deprived of the advantage which he gains through his superior activity and diligence. Indeed, where his original position in equity has been secured in good faith, the Courts have been little scrupulous to inquire how he has come by the legal estate. Moreover, a purchaser will not be deemed to have notice of a prior equity merely because he gets the legal estate through an instrument which discloses that equity, if he had no knowledge of such instrument at the time of his purchase (*y*). Sir W. M. James, L. J., there said: "When once you have arrived at the conclusion that the purchaser is a purchaser for valuable consideration without notice, the Court has no right to ask him how he is going to defend himself, or what he is going to rely on."

Legal estate
no protection
if acquired by
a breach of
trust.

There is, however, this limitation upon the power of a purchaser to secure himself by subsequently acquiring the legal estate: he cannot do so by becoming a party to a breach of trust. Thus it will not avail him to take a conveyance from a trustee when he has knowledge of the trust. If he does so, he himself becomes a trustee, and the

(*x*) *Goleborn v. Alcock*, 2 Sim. 552;
Blackwood v. London, &c. Bank, 5
L. R. P. C. C. 111.

(*y*) *Pitchev v. Rawlins*, 7 Ch. 259;
and see *Newman v. N.*, 28 Ch. D.
674.

legal estate will be no assistance to him (z). Thus a trustee for successive incumbrancers cannot, by conveying the legal estate to one of them, confer on him priority over the others (a).

Not only where the defendant purchaser has the legal estate, but where he has the best right to call for it, equity will not grant relief against him. This will be the case where one of two or more persons who are interested in equity has, in addition to the interest which he holds in common with the others, a special equity peculiar to himself—for instance, a particular declaration of trust in his favour (b), or has by superior diligence secured possession of the title deeds. And of course a purchaser for value would have a better right than a volunteer (c).

Where defendant has best right to call for the legal estate.

Where, moreover, there are circumstances which give rise to a mere equity as distinguished from an equitable estate—as, for example, to set aside a deed for fraud, or to correct a mistake—and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the Court will not interfere against him (d).

Same rule where the plaintiff asserts a mere equity.

2. *Where the legal estate is outstanding.*

Where the legal estate is outstanding, another maxim is applicable—*Qui prior est tempore potior est jure*. Thus the defence of a purchase for value without notice will not avail against a prior equitable incumbrancer. It is a well known principle, elsewhere fully expounded (e), that a third mortgagee who lent his money without notice of the second mortgage may gain priority over that incumbrance by buying in the first mortgage with the legal estate.

Where legal estate is outstanding, priority determined by time.

(z) *Saunders v. Dehew*, 2 Vern. 271; *Allen v. Knight*, 5 Ha. 272; 11 Jur. 527.

(a) *Collyer v. Finch*, 19 Beav. 500; 5 H. L. 905; *Harpham v. Shacklock*, 19 Ch. D. 207.

(b) *Willoughby v. W.*, 1 T. R. 763; *Wilnot v. Pike*, 5 Ha. 14;

Hartopp v. Huskisson, 55 L. T. R. 773.

(c) *Buckle v. Mitchell*, 18 Ves. 100.

(d) *Phillips v. P.*, 4 De G. F. & J. 208; *Sturge v. Starr*, 2 My. & K. 195.

(e) *Sup. pp. 275 et seq.*

But no such priority would be gained if the first was a merely equitable mortgage (*f*).

Fund in Court
or legal estate
in trustee.

Where, however, a fund is in Court, or the legal estate is outstanding in a trustee, and the estate is claimed by several adverse but innocent purchasers for value without notice, the Court will declare the right to the fund, will make a decree against some one or more of the purchasers for value, and will then, to give effect to its decree, order the delivery up of the title deeds to the person held to have the best title (*g*). And where an executor mortgaged trust property by a deposit of title deeds, the mortgage was postponed to the *cestui que trust*, whose claim was prior in time (*h*).

Trustee
making good
one breach of
trust by
another.

Where a trustee has committed a breach of trust, and has afterwards made that default good by applying another trust fund for that purpose, the Court will not deprive the first *cestuis que trusts* of the fund thus placed at their disposal at the expense of the *cestuis que trusts* of the second fund. The former are considered as purchasers for value without notice, and so entitled to protection (*i*).

3. *Where the plaintiff has the legal estate.*

Where the
plaintiff had
legal estate,

Previous to the Judicature Act (*k*), when a plaintiff who had the legal estate sought the assistance of equity to perfect his interest, and the defendant pleaded a *bonâ fide* purchase for value without notice, a distinction was taken according to the nature of the relief which he asked.

It might be that, as in *Basset v. Nosworthy* (*l*), he desired to obtain from the defendant discovery of some instrument relating to the title, or some similar assistance which could not be afforded to him by a Court of law. In other words, his application might be to the *auxiliary* jurisdiction of the Court. Or, on the other hand, the

(*f*) *Phillips v. P.*, 4 De G. F. & J. 208; *Brace v. D. of Marlborough*, 2 P. Wms. 491.

(*g*) *Stackhouse v. C. of Jersey*, 1 J. & H. 721; *Newton v. N.*, 4 Ch. 144; *Cooper v. Vesey*, 20 Ch. D.

611.

(*h*) *Pillgrem v. P.*, 18 Ch. D. 93.

(*i*) *Thorndyke v. Hunt*, 3 De G. & J. 563; *sup.* p. 129.

(*k*) 36 & 37 Vict. c. 66.

(*l*) *Sup.* p. 319.

plaintiff might sue in equity in a matter in which the Court of Chancery exercised a legal jurisdiction concurrently with the Courts of law.

In the former case it was well established that if the defendant successfully maintained a plea of purchase for value without notice, equity would not assist the plaintiff against him (*m*). It mattered not that the plaintiff was actually in possession of the property under a legal title (*n*), or whether the property in question was real or personal estate (*o*). The reasoning was that the defendant had an equal claim with the plaintiff in equity, and that equity would therefore not interfere with his rights.

and appealed to auxiliary jurisdiction, Court would not assist him.

In the latter case, however, it was held that the same plea would not avail. Where a widow filed a bill claiming dower against a purchaser for value without notice from her husband, the plea of the purchase for value was overruled (*p*); and the same was the case in a bill for tithes (*q*); the true ground for the decisions being that the Court was not there asked to give to the plaintiff any equitable as distinguished from legal relief (*r*).

Scous where he appealed to the concurrent jurisdiction.

The case of a legal mortgagee seeking foreclosure is in some respects exceptional. He is entitled to a decree against a *bonâ fide* purchaser, notwithstanding that the latter advanced his money without notice of the prior incumbrance (*s*). In this case the plaintiff seeks an equitable remedy attached to his legal right, with respect to which he cannot be told to seek his remedy at law; so that his position differs from that of a plaintiff who through the medium of a Court of equity seeks to enforce a legal claim. But though he might get his foreclosure decree, it was held that he was not entitled at the same

Legal mortgagee seeking foreclosure entitled to relief.

(*m*) *Burlase v. Cooke*, Freem. 24; *Jerrard v. Saunders*, 2 Ves. 454.

(*n*) *Wallwyn v. Lee*, 9 Ves. 24; *Joyce v. De Moleyns*, 2 J. & L. 374.

(*o*) *Dawson v. Prince*, 2 De G. & J. 41.

(*p*) *Williams v. Lamb*, 3 Bro. C. C. 264.

(*q*) *Collins v. Archer*, 1 R. & M. 284.

(*r*) *Phillips v. P.*, 4 De G. F. & J. 208, 217.

(*s*) *Finch v. Shaw*, 19 Beav. 500.

time to an order for the delivery of title deeds, as to which the defence would avail just as if a suit had been instituted for that purpose alone (*t*). And for the same reason the Court would not decree a sale instead of a foreclosure, under 15 & 16 Vict. c. 86, since the completion of the sale would involve a surrender of the title deeds, which the Court would not insist on (*u*).

Effect of Jud.
Act, 1873,
s. 24, sub-s. 6.

But by the Judicature Act (*x*) every Court can now enforce both legal and equitable claims (*y*), and recognise equitable defences (*z*). There is, therefore, no longer any distinction between the auxiliary and the concurrent jurisdiction of the Courts of equity; and the same reasoning which applied to *Williams v. Lambe* and *Collins v. Archer* would now apply to such cases as *Basset v. Nosworthy* and *Walshyn v. Lee*. This enactment, therefore, has the effect of requiring the Courts now to consider on their merits all cases in which this defence is raised (*a*).

4. *Where a bonâ fide purchaser is plaintiff.*

The purchaser
may some-
times come as
plaintiff.

In some cases equity will allow more than a merely negative force to the position of a *bonâ fide* purchaser for value. It will suffer him to come as a plaintiff to seek the delivery up and cancellation of documents which stand in the way of his complete security. Thus sleeping mortgages or incumbrances, under which no claim has been made for a long time, will be vacated in his favour (*b*).

(*t*) *Heath v. Crealock*, 10 Ch. 22.

(*u*) *Waldy v. Gray*, 20 Eq. 238.

(*x*) 36 & 37 Vict. c. 66.

(*y*) s. 24, sub-s. 6.

(*z*) sub-s. 2.

(*a*) *Ind, Coope & Co. v. Emmerson*,
12 App. C. 300; 33 Ch. D. 323.

(*b*) *Rutter v. Bartley*, Toth. 160;
Abdy v. Loveday, Rep. t. Finch,
250.

III. *Liability of Purchasers for Application of Purchase-Money.*

Since the decision in *Elliot v. Merryman* (c), which has always been quoted as a leading authority on the liability of purchasers from trustees to see to the application of the purchase-money, the whole law on the subject has been put on a different footing by the statutes to be presently referred to. These statutes, however, being of comparatively recent date, and not retrospective, there still occur many cases to which the old law is applicable. It is, therefore, necessary to consider first the principles applied by Courts of equity in cases where the statutes are not applicable; secondly, the operation of the statutes.

1. *As to personal property.*

(1.) However personal estate may be bequeathed, it must be applied in the first place by the executors or administrators for payment of the testator's debts, in a due course of administration. The general rule is abundantly established that a person who purchases or takes a mortgage of leaseholds or other personalty from an executor or administrator is not bound to see to the application of the purchase or mortgage money. The sale or mortgage of a chattel by an executor will be good against both the residuary and pecuniary legatees, as well as against the creditors of the testator. Their remedy, in case of the misapplication of the money by the executor, would be not against the purchaser or mortgagee, but against the executor himself; neither notice of the will, nor of the bequest contained therein, would be prejudicial to the purchaser or mortgagee (d). And the fact that a mortgage of part of the assets has been made to secure a debt originally con-

Purchaser of
personalty not
generally
liable.

Notice im-
material.

(c) 2 Atk. 4; 1 W. & T. L. C. 64. 148; *Andrew v. Wrigley*, 4 Bro.
(d) *Ewer v. Corbett*, 2 P. Wms. C. C. 125.

tracted on the personal security of the executor, and without reference to the assets, is immaterial (*e*).

Exceptions:

1. Where there is a particular trust of personalty.

2. Where purchaser is party to a fraud, which may be inferred from circumstances.

(2.) The Master of the Rolls, in *Elliot v. Merryman* (*f*), recognised two exceptions from the general rules. First, the personal estate may be clothed with such a particular trust that the Court may require a purchaser thereof to see the money rightly applied.

Secondly, where there is fraud on the part of a purchaser or mortgagee he remains answerable. Fraud may be inferred from circumstances; for instance, where an executor disposes of or pledges his testator's assets in payment of, or as security for, his own debt. In such a case the purchaser or pledgee would take subject to the claims of creditors, and also of the specific and general legatees of the testator (*g*). In the absence, however, of a fraud or collusion, or of knowledge on the part of the assignee that the debts of the testator were not all paid, the assignment by an executor as a security for his own debt of a chattel specifically bequeathed to him would be good (*h*).

Acquiescence by legatees and creditors.

On the other hand, length of time and acquiescence will prevent creditors and legatees from asserting their claim against purchasers; and the fact of the legacies being contingent would be no sufficient excuse for the legatees lying by, if they had such an interest as entitled them to know what debts the testator owed, and what part of his estate had been applied in payment of them (*i*).

2. *As to real property.*

Land devised for payment of debts.

(1.) Land devised on trust for sale for payment of debts, &c.

Contrast of law and equity.

At law trustees in whom real property was vested could of course give a valid discharge for the purchase-money.

(*e*) *Miles v. Durnford*, 2 De G. M. & G. 641.

(*f*) 2 Atk. 4.

(*g*) *Hill v. Simpson*, 7 Ves. 152; *Pilgrem v. P.*, 18 Ch. D. 93.

(*h*) *Taylor v. Hawkins*, 8 Ves. 209; *Crane v. Drake*, 2 Vern. 616.

(*i*) *Andrew v. Wrigley*, 4 Bro. C. C. 135.

But the persons amongst whom the produce of the sale was to be distributed being considered in equity the owners, Courts of equity held that a purchaser must obtain a discharge from them, unless the power of giving receipts was either expressly or by implication given to the trustees. And if no such discharge was given, and the trustees had no power to give receipts, the estate, upon a misapplication of the purchase-money, remained chargeable in the hands of the purchaser.

Where a power of giving receipts was in express terms conferred upon trustees, the purchaser was not, in the absence of fraud or collusion, bound to see to the application of the purchase-money. If no such power was given in express terms, there was frequent difficulty in determining whether such a power could be implied.

Where express power to give receipts provided.

As to this, one of the rules laid down in *Elliot v. Merryman* (*k*), and which was invariably followed, was that if the testator directed lands to be sold for the payment of certain debts, mentioning in particular to whom those debts were owing, the purchaser was bound to see that the money was applied for the payment of those debts. And the same rule was applicable where there was a trust for payment of legacies or annuities, which from their nature were placed on the same footing as specified or scheduled debts (*l*). In cases coming within this rule, the trusts being of a limited and definite nature, and such as a purchaser might without inconvenience see properly performed, a power to give receipts could not be implied.

Power, when implied.

Not in case of scheduled debts and legacies.

Another rule was that if the testator directed the land to be sold for the payment of *debts generally*, the purchaser was not bound to see the money rightly applied. In such cases it was esteemed that the trust was of too general and unlimited a nature to be undertaken by a purchaser; and it was therefore held that an implied power was bestowed

But otherwise where trust was for payment of debts generally;

(*k*) 2 Atk. 4.

(*l*) *Johnson v. Kennett*, 3 My. &

K. 624, 630; *Horn v. H.*, 2 S. & S. 448.

on the trustees to give receipts in full discharge for the purchase-money.

though followed by trust to pay legacies.

If the trust included at the same time the payment of legacies and annuities and the payment of debts, the latter principle was clearly the one to be applied, since it was only after the execution of the general trust to pay debts that the limited trust to pay legacies would arise. The purchaser's position, therefore, would be just the same as in a general trust for payment of debts only (*m*).

Annuities not distinguishable from legacies.

In some cases it was sought to distinguish annuities from legacies (*n*), but neither on principle or authority could such a distinction be supported. And if there was a general charge of debts it was held immaterial that one particular debt was mentioned (*o*). And, again, where there was a trust for payment of debts generally and also legacies, a purchaser, even after the debts had in fact been paid, was held not liable to see to the application of the purchase-money in payment of the legacies (*p*). Lord Lyndhurst in so deciding pointed out that the rule had reference to the state of things at the death of the testator (*q*). And it made no difference if in fact there were no debts when the testator died.

Immaterial that debts have in fact been paid,

or that there were no debts.

Trusts declared involving personal discretion.

Where money to arise from a sale was not merely to be paid to certain persons, but was to be applied by the trustees upon trusts requiring care and discretion, the presumption was that the settlor intended to confide the execution of the trust to the trustees solely, and the purchaser was not then bound to see to the application of the purchase-money (*r*), and so where an estate was charged with a sum of money payable to an infant on his attaining his majority (*s*).

(*m*) *Johnson v. Kennett*, 3 My. & K. 624; *Page v. Adam*, 4 Beav. 269.

(*n*) *Johnson v. Kennett*, *sup.*; *Eland v. E.*, 1 Beav. 235.

(*o*) *Robinson v. Lowater*, 17 Beav. 592; 5 De G. M. & G. 272.

(*p*) *Johnson v. Kennett*, *sup.*

(*q*) *Stroughill v. Anstey*, 1 De G. M. & G. 635. See also *Forbes v. Peacock*, 1 Ph. 717.

(*r*) *Doran v. Wiltshire*, 6 Swanst. 699.

(*s*) *Dickenson v. D.*, 3 Bro. C. C. 19.

A purchaser was not bound to ascertain how much land it was necessary to sell for payment of the debts (*t*). And where lands were devised to trustees upon trust to raise so much money as the personal estate should fall deficient in paying the testator's debts and legacies, a purchaser was not bound to inquire whether the real estate was wanted or not. *Secus*, however, if the trustees had merely a *power* to raise money upon the deficiency of the personal estate, for then, unless there was a deficiency the power never arose, and consequently the purchaser could take no estate by the supposed execution of it (*u*).

Purchaser not bound to inquire whether sale was necessary,

unless power to sell only arose on deficiency.

(2.) Land devised charged with debts, &c.

It was laid down in *Elliot v. Merryman* (*x*) that the rules as to a purchaser's liability were the same where land was devised charged with debts or legacies, or both, as where it was devised expressly upon trust for these purposes, the charge being considered equivalent to a trust (*y*). The authorities already mentioned as referring to one case may, therefore, generally be considered as also illustrating the other. There are, however, certain matters particularly relating to such charges which require separate consideration. Prominent among these is the question whether a charge of debts authorised a sale of real estate by executors.

Land charged with debts : same rules apply.

It was laid down by Sir L. Shadwell, V.-C., in *Forbes v. Peacock* (*z*), that if a testator charged his real estate with payment of his debts, that, *primâ facie*, gave the executor power to sell the real estate, and to give the purchaser a good discharge for the purchase-money. This was sustained to a certain extent in *Shaw v. Borrer* (*a*) and in *Ball v. Harris* (*b*), but it has been questioned whether

Whether it gives power of sale to executors.

(*t*) *Spalding v. Shalmer*, 1 Vern. 303.

(*u*) *Culpepper v. Aston*, 2 Ch. Ca. 115; *Bird v. Fox*, 11 Ha. 40.

(*x*) 2 Atk. 4.

(*y*) See also *Jenkins v. Hiles*, 6 Ves. 654, note; *Page v. Adam*, *sup.*; *Shaw v. Borrer*, 1 Kee. 559.

(*z*) 12 Sim. 528, 541.

(*a*) *Sup.*

(*b*) 4 My. & Cr. 264.

Equitable
power not
legal.

such a charge conferred a *legal* power to sell, and whether in consequence, a defendant in a suit for specific performance ought to be compelled to complete the purchase without a conveyance from the heir-at-law (*c*). The decisions on this point have been somewhat conflicting (*d*). The conclusion to be drawn from them seems to be that where there was a general charge of debts upon real estate the executors had in equity an implied power to sell it, and they alone could give a valid receipt for the purchase-money; but that they did not take by implication a legal power to sell, and could not, therefore, convey the legal estate, it being necessary to complete the purchaser's title that the persons in whom it was vested (if not already in the executors by devise or otherwise) should concur in the conveyance (*e*).

Secus where
debts were
charged.

Where there was a *charge of debts* upon real estate, a purchaser from the heir or devisee, or their alienee, could not safely complete without either the concurrence of the executors or without being satisfied that all the debts had been paid (*f*). The general opinion seems to have been that where, subject to a charge of debts, an estate was devised to persons either beneficially or as trustees for special purposes, a sale could be effected by them alone. And where there was an express trust for sale at a particular period which had arrived, the trustees could sell without the concurrence of the executors, who might previously have sold under the implied power arising from a general charge of debts (*e*).

Purchaser
always liable
if party to a
breach of
trust,

The rule that a purchaser was not bound when the debts were charged generally, was subject to the obvious exception that if he was a party to a breach of trust he would

(*c*) *Gosling v. Carter*, 1 Coll. 644.

(*d*) *Doe d. Jones v. Hughes*, 6

Exch. 223; *Robinson v. Lowater*, 17

Beav. 532; *Wrigley v. Sykes*, 21

Beav. 337.

(*e*) *Hodkinson v. Quinn*, 1 J. & H. 303, 309.

(*f*) *Storry v. Walsh*, 18 Beav. 559.

receive no protection; for instance, where a devisee, having a right to sell, sold to pay his own debt, and the purchaser had notice of these facts (*h*). Where trustees, instead of selling under a power in a will, raised money by mortgage in a manner not authorised by the power, many years after the testator's death, the mortgagee being party to a breach of trust, his security was invalid (*i*); but the mortgagee in such a case was entitled to stand as a creditor in respect of the produce of the estates, to the extent to which the mortgage money was rightly applied (*k*).

Another exception was where the purchaser had notice of a suit having been instituted which took the administration of the estate out of the trustee's hands (*l*).

or has notice
of administra-
tion suit.

3. *Statutory modifications of the principles.*

It now remains to consider how these principles, which rested on the decisions of the Courts, have been affected by statutory enactments.

(1.) As to purchasers' liability.

i. By 7 & 8 Vict. c. 76, s. 10, it was enacted that the *bonâ fide* payment to and receipt of any person to whom any money should be payable upon any express or implied trust, or for any limited purpose, should effectually discharge the person paying the same from seeing to the application, or being answerable for the misapplication thereof, unless the contrary should be expressly declared by the instrument creating the trust or security. This Act, however, only remained in operation from December 31st, 1844, to October 1st, 1845, it having been repealed by 8 & 9 Vict. c. 106. It therefore affects only such wills, &c., as were executed between those two dates.

As to pur-
chasers'
liability.
7 & 8 Vict.
c. 76.

ii. The law is now chiefly regulated by the provisions in this respect of Lord St. Leonards' Act (*m*), which was passed and came into operation on August 13th, 1859.

8 & 9 Vict.
c. 106.

22 & 23 Vict.
c. 35.

(*h*) *Eland v. E.*, 4 My. & Cr. 427.

(*k*) *Devaynes v. Robinson*, 24 Beav. 86.

(*i*) *Stroughill v. Anstey*, 1 De G. M. & G. 635.

(*l*) *Lloyd v. Baldwin*, 1 Ves. 173.
(*m*) 22 & 23 Vict. c. 35.

s. 23. By sect. 23 of this Act it is enacted “that the *bonâ fide* “payment to, and the receipt of, any person to whom any “purchase or mortgage money shall be payable upon any “express or implied trust, shall effectually discharge the “person paying the same from seeing to the application, “or being answerable for the misapplication thereof, unless “the contrary shall be expressly declared by the instru- “ment creating the trust or security.” It seems the better opinion that this clause applies only to trusts created since the Act (*n*).

23 & 24 Vict. c. 145, s. 29. iii. A more extensive power, in that it is not confined to purchase or mortgage money, was given by Lord Cranworth’s Act (*o*), which has, however, been since replaced by a still more comprehensive section in the Conveyancing and Law of Property Act, 1881 (*p*).

44 & 45 Vict. c. 41, s. 36. This statute enacts that “the receipt in writing of “any trustees or trustee for any money, securities, or other “personal property or effects payable, transferable, or “deliverable to them or him under any trust or power, “shall be a sufficient discharge for the same, and shall “effectually exonerate the person paying, transferring, or “delivering the same from seeing to the application, or “being answerable for any loss or misapplication thereof.” And this applies to trusts created either before or after the commencement of the Act.

As to power of sale.

(2.) As to the power of sale.

Lord St. Leonards’ Act also contains important provisions respecting the powers of trustees and executors to sell, in various circumstances.

General effect of the statute.

The general effect of the statute may thus be summed up:—It has removed the difficulty created by the decisions in two cases: 1st, If a testator charges his real estate with debts, and devises all his estate therein to trustees, the *trustees* for the time being, however appointed, can sell or

(*n*) Lewin, 7th ed. 270.

(*o*) 23 & 24 Vict. c. 145, s. 29.

(*p*) 44 & 45 Vict. c. 41, s. 36.

mortgage for the satisfaction of the charge (*q*) ; 2ndly, If after a similar charge the testator does not devise all his estate therein to trustees, the *executor* has power to sell or mortgage (*r*). This power cannot be exercised by an administrator (*s*) nor an administrator *cum testamento annexo* (*t*). But in cases where the testator died before the 13th of August, 1859, or where there is a devise, subject to a charge of debts, to a beneficial owner in fee or in tail, or for all other the testator's interest in the estate, the Act leaves this question in the same doubt and perplexity as before. No testator, then, ought to create a charge of debts upon his real estate without at the same time expressly creating a trust or power for giving effect to the charge, and distinctly pointing out the persons by whom the trust or power is to be exercised.

IV. *Assignment of Possibilities and Choses in Action.*

1. It was an ancient and well established principle of common law that no possibility, right, title, nor thing in action could be granted or assigned to strangers (*u*) ; and accordingly, if there was what purported to be an assignment of such interests, the assignee could not sue at law for them in his own name.

Possibilities and choses in action not assignable at law.

The necessities of commerce, however, long ago effected a modification of this principle, even at law. Some choses in action, of which bills of exchange are a type, became assignable by custom ; others have from time to time been expressly made so by statute—for instance, promissory notes, by 3 & 4 Anne, c. 9, 7 Anne, c. 25 ; railway bonds, by 8 & 9 Vict. c. 19 ; endorsed bills of lading, by 18 & 19 Vict. c. 111 ; and, as we have elsewhere observed, policies

Exceptions, customary and statutory.

(*q*) ss. 14, 15.

(*r*) s. 16.

(*s*) *Ricketts v. Lewis*, 20 Ch. D.

745.

(*t*) *Re Clay*, 16 Ch. D. 3.

(*u*) *Lampet's Case*, 10 Co. 47.

of life and marine assurance, by 30 & 31 Vict. c. 144, and 31 & 32 Vict. c. 86 (x). But in all cases not so provided for, it until recently remained necessary for an assignee suing at law to use the name of the original creditor (y).

Assignments
recognised in
equity.

Courts of equity, on the other hand, have been wont from an early period to recognise the validity of the assignment of possibilities and choses in action generally; and have continually carried such assignments into effect, when made for valuable consideration (z).

We are thus led to the consideration of a striking and fundamental contrast of principles between law and equity, which remains of importance, notwithstanding the provisions of the Judicature Act presently quoted.

First, it will be desirable to cite in detail, by way of illustration, some instances of rights which have been deemed assignable in equity, though not so in law.

Of these there are two principal classes, the first comprising possibilities; the second, debts of various kinds.

Possibilities.

(1.) In respect of the former, one of the leading authorities is the case of

WARMSTREY v. TANFIELD.

[1 Ch. Rep. 29; 2 W. & T. L. C. 724.]

There, one William Freeman, being possessed of the third part of a parsonage for the whole term to come, granted all his interest therein to one Alborough, in trust for the use of the said Freeman and his wife during their lives, and after to the use of such issue male of their bodies as the said Freeman should by will appoint. Freeman appointed the premises after the death of his wife to his son Richard, who, during the life of his mother, assigned the premises to the plaintiff. The defendant claimed

(x) *Sup.* p. 60.

(y) *De Pothier v. De Mattos*,
Ell. Bl. & Ell. 467.

(z) *Anon.*, *Freem.* 145; *Squib v. Wyn*, 1 P. Wms. 381.

under a lease made by the said Richard Freeman two years after the said assignment.

It was held that though the assignment was of a mere possibility (being dependent on Richard's surviving his mother), and therefore not good in law, yet it was valid in equity, and the plaintiff's claim was allowed, as arising under a deed precedent to that through which the defendant claimed.

(2.) On grounds analogous to this we find equity enforcing assignments of mere expectancies, such as that of an heir-at-law (*a*), or the next of kin of a living person (*b*), or the interest which a person expects under the will of a living person (*c*), or the share to which a person may become entitled under an appointment (*d*). Expectancies.

(3.) By a somewhat further extension of the same principle, non-existent property, or property to be acquired at a future time, has been held assignable in equity; such as the future cargo of a ship (*e*), future patent rights (*f*), machinery yet to be erected (*g*), and future stock in trade to be brought on the mortgaged premises (*h*). But such assignments of future interests are invalid if there is any uncertainty as to the property intended to pass (*i*); they are liable to be postponed to a purchaser who secures the legal title (*h*), and are subject to the right of the assignee's trustee in bankruptcy in case of his bankruptcy occurring before the expectancy falls into possession (*k*). Non-existent and future property.

(4.) The jurisdiction of the Courts of law was extended by 8 & 9 Vict. c. 106, by s. 6 of which it was enacted that thereafter contingent, executory and future interests and possibilities, *coupled with an interest in real estate*, might 8 & 9 Vict.
c. 106, s. 6.

(*a*) *Hobson v. Trevor*, 2 P. Wms. 191.

19 Eq. 462.

(*b*) *Hinde v. Blake*, 3 Beav. 235.

(*g*) *Holroyd v. Marshall*, 10 H. L. 191.

(*c*) *Beckley v. Newland*, 2 P. Wms. 182.

(*h*) *Joseph v. Lyons*, 15 Q. B. D. 280; *Hallas v. Robinson*, *ib.* 288.

(*d*) *Musprat v. Gordon*, 1 Anst. 34.

(*i*) *Tadman v. D'Epineuil*, 20 Ch. D. 758.

(*e*) *Lindsay v. Gibbs*, 22 Beav. 522.

(*k*) *Collyer v. Isaacs*, 19 Ch. D. 342; *Exp. Nichols*, 22 *ib.* 782.

(*f*) *Printing, &c. Co. v. Sampson*,

be assigned at law by deed. But this Act left untouched assignments of contingent interests in chattels, and mere naked possibilities not coupled with an interest. As to such, therefore, equity alone continued to recognize the validity of assignments.

Choses in
action.

(5.) One of the principal authorities on the assignment of debts is

ROW v. DAWSON.

[1 Ves. sr. 331; 2 W. & T. L. C. 726.]

In this case Tonson and Conway lent money to Gibson, who gave them a draft in the following terms: "Out of the money due to me from Horace Walpole out of the Exchequer, and what will be due at Michaelmas, pay to Tonson and Conway; value received." Gibson having become bankrupt, the question was whether this draft created a specific lien upon the sum due to his estate.

Lord Hardwicke distinguished between this draft and a bill of exchange, the draft being not to pay generally, but out of a particular fund, and creating no personal demand; and he held that there being an agreement for valuable consideration beforehand to lend money on the faith of being satisfied out of the fund, the draft was a credit on the fund, and amounted to an assignment of so much of the debt; and that though the law did not admit an assignment of a chose in action, equity did, and that any words would do, no particular form being necessary thereto.

The first question which arises in cases of this nature is as to what does and what does not amount to a valid equitable assignment.

No particular
form re-
quired.

The above case establishes the principle that any words which show an intention to appropriate the chose in action to the assignee, are, if supported by valuable consideration, sufficient to effect a valid assignment. In other words, an agreement between a debtor and a creditor that the debt owing shall be paid out of a *specific fund* coming to the

debtor (*l*), or an order given by a debtor to his creditor upon a third person, who has funds of the debtor, to pay the creditor out of such funds (*m*), will effect a complete assignment in equity of so much money (*n*). An assignment of future *specified* debts is valid (*o*): but an assignment of future debts *generally* is void for uncertainty (*p*). Writing is not necessary, if there is clear proof of an oral charge (*q*).

The intention to create a charge must, however, be clear. A promise to pay when the debtor receives a debt due to him from a third person is not sufficient (*r*), nor is a statement that the arrival of a certain cargo would put him in funds (*s*); nor is a cheque or bill of exchange an equitable assignment of the drawer's balance at his bank (*t*).

Intention must be clear.

Again, an equitable assignment is not complete until it is communicated to the creditor. Thus a mere mandate from a principal to his agent to pay a debt out of a certain fund gives the creditor no specific charge on that fund (*u*). Until such mandate is communicated to the creditor, and assented to by him, it may be revoked (*x*), and the bankruptcy of the debtor operates as such revocation (*y*). But after such communication the agent becomes the debtor of the assignee, and the order cannot then be countermanded (*z*).

Assignment complete only on communication to creditor.

On the other hand, a mere power of attorney, or autho-

Must be

(*l*) *Percival v. Dunn*, 29 Ch. D. 128; *Rodick v. Gandell*, 1 De G. M. & G. 763, 776.

(*m*) *Burn v. Carvalho*, 4 My. & Cr. 702; *Re Toward*, 14 Q. B. D. 310.

(*n*) *Diplock v. Hammond*, 2 Sm. & G. 141; 5 De G. M. & G. 320; *Lett v. Morris*, 4 Sim. 607.

(*o*) *Coombe v. Carter*, 35 Ch. D. 109.

(*p*) *Official Receiver v. Tailby*, 18 Q. B. D. 25, reversing 17 *ib.* 88.

(*q*) *Gurnell v. Gardner*, 7 Jur. N. S. 1220; *Parish v. Poole*, 53 L. T. R. 35.

(*r*) *Field v. Megaw*, 4 L. R. C. P. 660.

(*s*) *Jones v. Starkey*, 16 Jur. 510.

(*t*) *Hopkinson v. Forster*, 19 Eq. 74; *Shand v. Du Buisson*, 18 Eq. 283.

(*u*) *Morell v. Wooten*, 16 Bea. 197.

(*x*) *Scott v. Forcher*, 3 Mer. 652.

(*y*) *Exp. Hall*, 10 Ch. D. 15.

(*z*) *Fitzgerald v. Stewart*, 2 R. & M. 457.

addressed to
debtor.

rity to a person to receive money, not addressed to the debtor, does not amount to an equitable assignment (*a*).

2. *Notice, how far required.*

Notice not
needed as
between
assignor and
assignee.

(1.) An equitable assignment is complete as between assignor and assignee, though no notice thereof is given to the depositary or holder of the fund (*b*); nor is notice necessary as against a person standing in the same position as the assignor, such as a judgment creditor (*c*), or a creditor under a garnishee order (*d*). Such a creditor will therefore be postponed to an equitable assignee, notwithstanding that he may have, after the assignment, but before notice to the depositary, obtained an order charging the fund (*e*).

But is re-
quired to
complete
security;

(2.) But to complete the security of the assignee, it is for many purposes necessary for him promptly to give notice of the assignment to the holder of the fund.

otherwise
debtor may
safely pay
assignor,

First, in the absence of such notice the holder of the fund may effectually discharge himself by paying the assignor, and if he does so the charge of the assignee will, of course, be lost (*f*).

or subsequent
incumbrancer
may gain
priority.

Secondly, if the assignor make a subsequent assignment of the debt, and the second assignee gives notice before the first does so, the second thereby gains priority (*g*), whether the interest of the assignor be present or future, vested or contingent. The principle is the same as that which requires the assignee of a personal chattel to take every step in his power to reduce it into possession, and in case of his neglect postpones him to a subsequent assignee for value, who takes without notice. Of the two parties one must suffer; and equity will not assist the one prior in time if by his negligence the possessor has been enabled to

Dearle v. Hall.

(*a*) *Rodick v. Gandell*, 1 De G. M. & G. 763; *Bell v. L. & N. W. R.*, 15 Beav. 548.

(*b*) *Jones v. Gibbons*, 9 Ves. 410; *Cook v. Black*, 1 Ha. 390.

(*c*) *Beavan v. Ld. Oxford*, 6 De G. M. & G. 492.

(*d*) *Pickering v. I. R. Co.*, 3 L. R.

C. P. 235.

(*e*) *Scott v. Ld. Hastings*, 4 K. & J. 633.

(*f*) *Norrish v. Marshall*, 5 Madd. 475.

(*g*) *Dearle v. Hall*, *Loveridge v. Cooper*, 3 Russ. 1, 30, 48; *Brice v. Bannister*, 3 Q. B. D. 569.

deceive the second assignee. If, however, the former has done all he could to secure possession, he will not lose his priority (*h*). If the notices of the assignments are simultaneous they will take priority according to their dates (*i*). The doctrine, however, does not apply to shares in registered companies, equitable charges on which have priority in order of date, unaffected by notice (*h*).

Again, notice is often requisite to protect an assignee against the effect of the reputed ownership clause of the Bankruptcy Act. Under the present Act (*l*) all goods and chattels being at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, are treated as the property of the bankrupt divisible among his creditors; provided that things in action, other than debts due or growing due to the bankrupt in the course of his business, shall not be deemed goods within the meaning of the Act.

Reputed ownership in bankruptcy.

An assignee of chattels is only protected against this clause by taking every step he can to secure possession. Under the former acts, choses in action were within the clause as comprehended under "goods and chattels," and in order to divest from the mortgagor the ownership of outstanding choses in action, notice to the debtor was necessary (*m*). The same principle still applies to outstanding debts due to the bankrupt in the course of his business. Shares in an incorporated company are choses in action, and accordingly not within the clause (*n*).

It has been held that it is sufficient protection for the assignee if he gives notice between the act of bankruptcy and the petition for adjudication, *bonâ fide* dealings with

(*h*) *Feltham v. Clark*, 1 De G. & Sm. 307.

(*i*) *Calisher v. Forbes*, 7 Ch. 109; *Johnstone v. Cox*, 16 Ch. D. 571.

(*k*) *Société Générale de Paris v. Walker*, 11 App. C. 20.

(*l*) 46 & 47 Vict. c. 52, s. 44.

(*m*) *Ryall v. Rowles*, 1 Ves. sr. 348; 2 W. & T. L. C. 729.

(*n*) *Colonial Bank v. Whinney*, 11 App. C. 426.

the bankrupt during that time being especially protected (o).

Equitable
interests in
land dis-
tinguished.

The distinction must be observed between such cases as these, in which priority is determined by the time of notice, and the case of equitable interests in land, priority as to which is fixed by the order in time of the incumbrances, and is not affected by notice (p).

Charging
order.

Transfer into
Court;
stop order.

For the reasons above given an assignee of a debt should always promptly give written notice of the assignment to the debtor, since by this means alone can he secure a right *in rem* to the debt. The assignee can completely protect his security by obtaining a charging order upon the funds, or a transfer of them into Court (q). If the fund is already in Court the assignee should at once obtain a stop order, or he is liable to be postponed to a subsequent assignee who takes this step before him (r). This has just the same effect as notice to a trustee while the fund is in his hands, and if the fund is paid in after such notice, it is secure, even without a stop order (s).

Assignee
takes subject
to equities;

3. The assignee of a chose in action, whether it be a debt or a trust fund, generally takes it subject to all equities which affect it as against the assignor. Thus, a bond void as against the assignor does not become valid in the hands of an assignee (t); if the assigned debt is subject to a set-off by the debtor, the assignee is liable to the set-off (u); if the debt is payment only on condition, the condition is binding on the assignee (x); and generally, the assignee takes subject to the state of accounts between the assignor and the debtor (y). Similarly, an assignee of a

(o) s. 49. *Re Styant*, 1 Ph. 105; 2 M. D. & De G. 219.

(p) *Jones v. J.*, 8 Sim. 633; *Wiltshire v. Rabbits*, 14 Sim. 76.

(q) See O. XLVI.

(r) *Ibid.*; *Greening v. Beckford*, 5 Sim. 195; *Mutual Life, &c. Co. v. Langley*, 32 Ch. D. 460; *Swayne v. S.*, 11 Beav. 463.

(s) *Livesey v. Harding*, 23 Beav. 141; *Thompson v. Tomkins*, 2 Dr.

& Sm. 8; *Re Holmes*, 29 Ch. D. 786.

(t) *Turton v. Benson*, 1 P. Wms. 496.

(u) *Exp. Mackenzie*, 7 Eq. 240; *Cavendish v. Greaves*, 24 Beav. 163, 173.

(x) *Tooth v. Hallett*, 4 Ch. 242.

(y) *Ord v. White*, 3 Beav. 357; *Rolt v. White*, 31 ib. 520.

legacy or residue, though for value and without notice, takes subject to the testator's debts (z).

There are, however, two classes of exceptions to this rule. First, as to negotiable instruments, such as bills of exchange, which, on grounds of commercial convenience or necessity, carry with them a title free from any equities or cross-claims as between the parties thereto (a). On similar grounds, indorsed bills of lading (b) and debentures payable to bearer (c) have been similarly treated. Bills of exchange indorsed when overdue are not, however, within the exception (d).

except in case of negotiable instruments,

Secondly, equities affecting the chose in action may be lost by the release, either express or implied, of the person entitled thereto (e); or by his neglect to enforce them against the assignee. Enjoyment undisturbed for a considerable lapse of time always tends to strengthen the position of the assignee (f).

or of laches.

4. The law as to the assignment of choses in action has been placed on a different footing by the Judicature Act, 1873. It is thereby enacted (g) that "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and shall be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if the Act had not passed) to pass and transfer the legal

Jud. Act, s. 25, sub-s. 6.

(z) *Hooper v. Smart*, 1 Ch. D. 90.

(a) *Exp. City Bank*, 3 Ch. 758.

(b) *Chartered Bank, &c. v. Henderson*, 5 L. R. P. C. 501.

(c) *In re Blakely Ordnance Co.*, 3 Ch. 154.

(d) *Holmes v. Kidd*, 3 H. & N. 891.

(e) *In re Northern Assam Tea Co.*, 10 Eq. 458; *In re Agra, &c. Bank*, 2 Ch. 391.

(f) *Hill v. Caillouet*, 1 Ves. sr. 122; *Exp. Chorley*, 11 Eq. 157.

(g) 36 & 37 Vict. c. 66, s. 25, sub-s. 6.

“right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and a power to give a good discharge for the same without the concurrence of the assignor.”

Effect of.

It is only necessary with respect to this to observe that—

(1.) It applies only to absolute assignments. Mortgages, therefore, of debts remain on the same footing as before the Act, and the assignee of a debt by way of charge cannot sue at law (*h*).

(2.) It applies only to legal choses in action. Equitable choses in action, whether absolute or by way of charge, are unaffected by this section, and if assigned can be sued for in all Courts, the assignor and assignee being before the Court.

(3.) Express notice in writing of the assignment must have been given by the assignor. Previous, however, to this Act an oral assignment of a legal chose in action was valid in equity, and will now be regarded valid in all Courts, the mode of transfer under the Act not being compulsory (*i*).

Illegal assignments.

5. This is a convenient place in which to comment on certain assignments similar to those just now considered, but which are on grounds of public policy deemed void both at law and in equity.

Pensions, &c.

(1.) Pensions and salaries payable to public officers are considered as given for maintaining the dignity of their offices, and for securing the proper discharge of the duties thereof. Effect will not, therefore, be given to an attempted assignment of such pensions or salaries. Within this principle fall the pay of a military officer (*k*), of a clerk of the peace (*l*), of a judge (*m*), and in fact the emoluments

(*h*) *National Prov. Bank v. Harle*, 6 Q. B. D. 626.

(*i*) Coote, *Mortgages*, 556, 5th ed.

(*k*) *Stone v. Lidderdale*, 2 Anstr. 533.

(*l*) *Palmer v. Bate*, 6 Moo. 28; 2 Br. & B. 673.

(*m*) *Arbuthnot v. Norton*, 5 Moo. P. C. 219.

of any public office (*n*). Alimony is likewise not assignable (*o*).

Where, however, no particular service is to be rendered to the public, an assignment of an interest or pension is valid. Thus prize money was held assignable (*p*); so also the pension of a County Court Judge for past services (*q*), and civil service pensions generally (*r*). What pensions are assignable.

(2.) Public policy, again, is opposed to assignments which partake of the nature of champerty, or maintenance (*s*), or the buying of disputed or pretended titles. Champerty and maintenance.

Thus an assignment of a share of prize money, *the subject of a then depending suit* in the Admiralty Court, in consideration of the assignee paying the costs of the suit, was held void (*t*); the assignment of a bare right to file a bill in equity was similarly treated (*u*).

But in certain cases a purchase or mortgage of an interest *pendente lite*, or an advance of money for carrying on a suit, is admissible. It is so if the parties have a common interest (*x*), or if there exists between them the relation of father and son (*y*), ancestor and heir (*z*), or master and servant (*a*). The purchase *pendente lite* of the subject-matter of a suit by an attorney is, however, always invalid (*b*), unless at least it be by way of security for payment of his costs (*c*); and the law in this respect is unaffected by 33 & 34 Viet. c. 28, which enabled attorneys Purchase *pendente lite*, when admissible.

(*n*) See 46 Geo. III. c. 69, s. 7; 47 Geo. III. sess. 2, c. 25, s. 4; *Davis v. D. of Marlborough*, 1 Swanst. 74.

(*o*) *Re Robinson*, 27 Ch. D. 160.

(*p*) *Alexander v. D. of Wellington*, 2 R. & M. 35.

(*q*) *Willecock v. Terrell*, 3 Ex. D. 323.

(*r*) *Sanson v. S.*, 4 P. D. 69.

(*s*) *Bradlaugh v. Newdegate*, 11 Q. B. D. 1.

(*t*) *Stevens v. Bagwell*, 15 Ves. 139.

(*u*) *Prosser v. Edmonds*, 1 Y. & C. Ex. 481; *Powell v. Knowles*, 2 Atk. 226; *Hill v. Boyle*, 4 Eq. 260, 263; *In re Paris Skating Rink Co.*, 5 Ch. D. 959.

(*x*) *Hunter v. Daniel*, 4 Ha. 420.

(*y*) *Burke v. Greene*, 2 Ba. & B. 521.

(*z*) *Moore v. Fisher*, 7 Sim. 384.

(*a*) *Wallis v. D. of Portland*, 3 Ves. 503.

(*b*) *Simpson v. Lamb*, 7 E. & B. 84.

(*c*) *Anderson v. Radcliffe*, 6 Jur. N. S. 578.

and solicitors in certain cases to make agreements with their clients as to remuneration in lieu of costs (*d*).

The strict rule as to champerty seems to have been sometimes relaxed in special circumstances; for instance, the assignment of a legacy by a person too poor to sue for it, to another, who sought to enforce payment by suit, was upheld (*e*). And it is to be observed that a person who has originally a good title to sue will not lose it by entering into a bargain tainted with champerty (*f*).

(*d*) *In re Att. & Sol. Act*, 1870, 1
Ch. D. 573.

(*e*) *Tyson v. Jackson*, 30 Beav.
384.

(*f*) *Hilton v. Woods*, 4 Eq. 432.

CHAPTER VI.

SURETYSHIP.

- I. *Contrast between Legal and Equitable Doctrines.*
- II. *General Principles of Equity as to Suretyship.*
 - 1. *In the formation of the Contract.*
 - 2. *As to subsequent departure from the Terms.*
Rees v. Berrington.
- III. *Releases and Compositions.*
 - 1. *As to Debtor.*
 - 2. *As to Sureties.*
- IV. *Continuing Suretyship or Guarantee.*
- V. *Contribution between Co-sureties.*
Dering v. E. of Winchelsea.
- VI. *Right of Surety to Securities.*

I. *Contrast between Legal and Equitable Doctrines.*

THE distinctions which formerly existed between the principles of common law and those of equity respecting suretyship, may be concisely summarised under the following headings:—

1. Where it did not appear on the face of the instrument creating the suretyship that a person was surety—if, for instance, in a bond the principal debtor and surety were bound jointly and severally—the surety could not, *at law*, aver by pleading that he was bound only as a surety, nor was parol evidence admissible to prove it (a). But in

Proof of suretyship when not apparent on the face of the instrument.

(a) *Lewis v. Jones*, 4 B. & C. 506.

equity, although they both appeared as principals, parol evidence was always admissible to show that one was only a surety (*b*). The consequence was that upon the creditor giving further time to the principal debtor, knowing him to be such, the surety, upon proving that fact, might have relief in equity, although at law, where he appeared only as principal, he would formerly have been held bound (*c*). When equitable pleas became available at common law this distinction disappeared (*d*).

Release of
sureties under
deeds.

2. In general an obligation created by an instrument could at law only be dissolved by one of equal force. Thus, time given by a mere parol agreement, although for valuable consideration, would not at law have discharged a surety whose obligation arose from an instrument under seal (*e*), or by matter of record, such as a recognisance (*f*). In equity, however, this rule of law was disregarded; and as "*what is agreed to be done is looked upon as done*," relief is in such cases given (*g*). Conversely, by the operation of the same rule, a principal creditor might have been held at law to have released a surety, where in equity the surety would still be considered liable—for instance, where the creditor had by deed, with the parol consent only of the surety, released the principal debtor (*h*).

Conversely,
surety con-
tinuing liable
after release.

Principles of
contribution
at law.

3. The general principle of contribution between sureties at law originally rested on the ground only of an express contract between the parties. Subsequently jurisdiction was assumed to compel contribution in the absence of positive contract, on the ground of implied *assumpsit*. But though this assumption approached the equitable principle of dealing with such cases, since it was held that separate actions might be brought against the sureties

(*b*) *Clarke v. Henty*, 3 Y. & C. Ald. 187.
Ex. 187.

(*c*) *Craythorne v. Swinburne*, 14 Ves. 160, 170.

(*d*) *Pooley v. Harradine*, 7 E. & B. 431.

(*e*) *Davey v. Prendergrass*, 5 B. &

(*f*) *Bulteel v. Jarrold*, 8 Price, 467.

(*g*) *Bowmaker v. Moore*, 3 Price, 214.

(*h*) *Brooks v. Stuart*, 1 Beav. 512.

for their respective quotas and proportions, there was great inconvenience in working out the legal remedy, where the sureties were numerous. Hence the equitable relief by bill for contribution remained the best mode which could be resorted to.

4. Where there were several sureties, and one became insolvent, a surety who paid the entire debt could at law have recovered only an aliquot part of the whole, calculated according to the original number of the co-sureties (*i*). In equity he can compel the remaining sureties to contribute equally with himself (*k*). Thus if there were three sureties, one of whom became insolvent, and one of the remaining two paid the entire debt, at law he could only recover one-third from the remaining solvent surety; in equity he can recover one-half.

Insolvency of one of more sureties;

So, also, if one of several co-sureties died, at law an action only lay against the surviving sureties for their proportions; but in equity contribution can be enforced also against the representatives of the deceased surety (*l*).

or death.

It was owing to the imperfection of the legal remedy in these and other respects, which will be hereafter noticed, that the jurisdiction of equity in matters of suretyship arose; and being once established, it was not affected by the subsequently extended jurisdiction of the Courts of law. Cases of suretyship, therefore, continue to come chiefly under the cognizance of the Chancery Division of the High Court.

(*i*) *Cowell v. Edwards*, 2 B. & P. 271.
268. See *Lowe v. Dixon*, 16 Q. B. D. 455.
(*k*) *Hitchman v. Stewart*, 3 Drew.

(*l*) *Simpson v. Vaughan*, 2 Atk. 31; *Batard v. Hawes*, 2 E. & B. 287.

II. *The General Principles of Equity respecting Suretyship.*

1. *As to the original formation of the contract.*

Utmost good
faith re-
quired.

The intimate nature of the relation between the parties to the contract of suretyship requires that the utmost good faith should be adhered to by them; and though it has been held that the obligation to disclose all material facts, is not in this case so strict as in contracts between solicitor and client, and in contracts of partnership and of insurance, nevertheless, very little said which ought not to have been said, and very little omitted which ought to have been said, will suffice to avoid the contract (*m*). Whenever there is, with the knowledge and assent of the creditor, any undue advantage taken of the surety, as by concealment or surprise, the contract will be considered invalid, and the surety discharged from liability.

What con-
cealment
annuls the
obligation.

It is impossible to lay down in general terms any rule by which to determine what degree of concealment or misrepresentation is necessary to annul the obligation of the contract. Equity has always been reluctant to formulate definitions on such subjects, lest, having done so, its jurisdiction should be eluded by new schemes of man's ingenuity. Some guidance is, however, afforded by the well authorized statement that "if a party taking a guarantee from a surety conceals from him facts which go to increase his risk, and suffers him to enter into the contract under false impressions as to the real state of facts, such concealment will amount to fraud" (*n*). But this broad statement is, in fact, subject to certain limitations, since it has been held that the true criterion as to whether any disclosure ought to be made voluntarily, is to inquire whether there was anything which might not naturally have been expected to have taken place between the parties; that is, whether there was a contract between the debtor and cre-

(*m*) *Davies v. London and Prov. Marine Insee. Co.*, 8 Ch. D. 469;
N. B. Insee. Co. v. Lloyd, 10 Exch.

523.

(*n*) Story's Eq. Jur., s. 215.

ditor to the effect that his position should be different from that which the surety might naturally expect (o).*

A surety is entitled to be informed of any private bargain between a vendor and vendee, being a part of the immediate transaction, which can in any way increase his responsibility (p); and, moreover, if there are any circumstances which afford ground for suspecting that fraud is being practised upon the surety by the debtor, the creditor cannot shelter himself under the plea that he was not called upon to ask, and did not ask, any questions on the subject. In such cases wilful ignorance is not to be distinguished in its equitable consequences from knowledge (q).

Private bargains increasing the responsibility.
Fraud.

The rights of a creditor against a surety are regulated by the terms of the contract. The nature, extent, and duration of the obligation depend upon the construction of the agreement, which the Court will not reform on mere presumption of mistake (r).

2. *Effects of subsequent departure from the terms of the contract.*

(1.) Giving time to the debtor.

The case of

REES v. BERRINGTON

[2 Ves. jr. 540; 2 W. & T. L. C. 992]

is a leading authority for the general proposition that if a creditor, without the assent or knowledge of the surety, agrees to give to the principal debtor a longer time than was specified in the contract to which the surety was party, he thereby loses his claim against the surety (s). The cases, however, show that in the application of this principle many circumstances must be considered.

General rule as to giving time.

A merely passive attitude on the part of the creditor— Mere passive-

(o) *Hamilton v. Watson*, 12 Cl. & F. 109.

(p) *Pidcock v. Bishop*, 3 B. & C. 605.

(q) *Owen v. Homan*, 4 H. L. 997; *Maitland v. Irving*, 15 Sim. 437.

(r) *Rawstone v. Parr*, 3 Russ. 424, 539; *Lloyds v. Harper*, 16 Ch. D. 290.

(s) See also *Nisbet v. Smith*, 2 Bro. C. C. 579.

ness not sufficient,

unless there is an express stipulation to that effect.

Surety need not prove damage.

Time given with surety's consent.

The agreement to give time must bind the creditor.

Surety's rights must be affected.

for instance, his not taking proceedings against the debtor —will not, in the absence of a binding stipulation in the contract of suretyship requiring activity and promptness on his part, release the surety. He himself must use diligence (*t*). If there be a stipulation that on default the creditor is to sue without delay, then failure to do so will discharge the surety (*u*). In *Rees v. Berrington* the creditor was not merely passive, but, without the surety's consent, entered into a binding contract to give further time. In such a case it is immaterial that the delay is given in consequence of the debtor's inability to pay, or that no injury could thereby accrue to the surety. The surety is not required to prove damage. If there is a default he is entitled to be consulted as to what steps shall be taken (*x*).

A surety will not be discharged if time is given to the principal debtor with his consent or subsequent approval (*y*); and a subsequent promise to pay the debt will revive a liability which might otherwise have been discharged (*z*).

An agreement with the debtor to give him further time will not discharge the surety unless it is binding upon the creditor. A mere voluntary promise, not acted upon, and which cannot be enforced, will not have that effect (*a*). Nor will an agreement which is conditional upon the performance of an act which in the event the debtor does not perform (*b*).

A surety will not be discharged by the creditor giving time, if the remedies of the surety are not diminished or affected, *à fortiori* if they are accelerated (*c*).

(*t*) *Eyre v. Everett*, 2 Russ. 381.
(*u*) *B. of Ireland v. Beresford*, 6 Dow, 233.

(*x*) *Samuel v. Howarth*, 3 Mer. 272; *Latham v. Chartered Bank of India*, 17 Eq. 205.

(*y*) *Tyson v. Cox*, T. & R. 395; *Duffy v. Orr*, 5 Bli. N. S. 620.

(*z*) *Mayhew v. Crickett*, 2 Swanst. 185, 192.

(*a*) *Philpot v. Briant*, 4 Bing. 717; *Tucker v. Laing*, 2 K. & J. 745.

(*b*) *Badnal v. Samuel*, 3 Price, 521.

(*c*) *Hulme v. Coles*, 2 Sim. 12,

It seems that when a creditor has obtained a judgment against the surety, no subsequent dealings giving time to the debtor will have the effect of releasing the surety. His liability in fact no longer rests on his suretyship, but on the judgment (*d*). Surety not released by dealings after judgment;

Nor will the surety be discharged if the creditor, on giving further time to the principal debtor, reserves his right to proceed against the surety; and it is immaterial whether the surety is informed of the arrangement or not. The reason is, that when the right is reserved, the principal debtor cannot say that it is inconsistent with giving him time that the creditor should be at liberty to proceed against the sureties, and that they should turn round upon the principal debtor, notwithstanding the time so given him; for he was a party to the arrangement by which that right was reserved to the creditor (*e*). It is evident that in such a case, notwithstanding the time given to the principal debtor by the creditor, if the creditor at once proceeds against the surety, the surety may forthwith proceed in his turn against the debtor, and so the benefit of the extended time may not in effect be realised by him; but of this he cannot complain. The right of the surety against the principal debtor can only be lost by the surety's contract to abandon it (*f*). It seems that parol evidence is admissible to prove the reservation of right against the surety (*g*), unless the time is given by deed, in which case the reservation should appear thereon (*h*). nor if the rights against the surety are reserved.

Though a surety cannot compel the creditor to proceed against the debtor, if he apprehends loss from the delay

where a creditor took a *cognovit* in an action brought against the creditor with stay of execution until a day earlier than that on which judgment could have been obtained in the regular course.

(*d*) *Jenkins v. Robertson*, 2 Drew. 351.

(*e*) *Webb v. Hewitt*, 3 K. & J. 442; *Boulton v. Stubbbs*, 18 Ves. 20.

(*f*) *Close v. C.*, 4 De G. M. & G. 176.

(*g*) *Wyke v. Rogers*, 1 De G. M. & G. 408.

(*h*) *Exp. Glendinning*, Buck, 517.

of the creditor to sue the principal debtor, he may sue in equity *quia timet* to compel the debtor to discharge the debt (*i*), or, of course, he may himself discharge the debt, and forthwith proceed against the debtor for recovery of the money.

Divisible contract.

Where a contract is divisible—as, for instance, where successive payments are to be made at fixed periods—if the creditor contracts to give time as to one of such payments, he will release the surety as to that payment only, not as to subsequent payments (*j*).

Giving time to the surety.

(2.) Under this heading may be conveniently mentioned the analogous case in which the holder of a security agrees with the principal debtor to give time to the *surety*. It has been held that to do so effects the discharge of the surety (*k*). It was considered that this was a stronger case than an agreement to give time to the principal, which only implies an agreement not to sue the surety; but an express agreement not to sue the surety prevents the creditor from doing that which would throw the surety upon the principal.

(3.) Other variations in the contract.

Departures from the contract generally release sureties.

Where there is in the contract between the principal debtor and the creditor a departure from that which the surety stipulated for and contemplated when he entered into the obligation, the surety will, as a general rule, be released (*l*).

Illustrations.

Thus where a person had agreed to become surety for another in a joint and several bond to A. and B. upon having a counter-bond from A. and C. to indemnify him, and the first bond was executed by the surety only, A. and B. having neglected to procure the signature of the principal, it was held that the surety was not bound, though he

(*i*) *Wright v. Simpson*, 6 Ves. 734; *Wooldridge v. Norris*, 6 Eq. 410, *inf.*, p. 752.

(*j*) *Croydon Gas Co. v. Dickinson*, 2 C. P. D. 46.

(*k*) *Oriental, &c. Corp. v. Overend, Gurney & Co.*, 7 Ch. 142, *per* Lord Hatherley, p. 152; see *S. C.*, 7 L. R. H. L. 349.

(*l*) *Bonser v. Cox*, 4 Beav. 379; 6 *ib.* 110.

received the bond of indemnity from A. and C. The surety had a material interest in the extent of the rights and remedies of the creditor against the principal debtor; and these being different from what he contemplated and contracted for, there was no claim against him (*m*). But if in such circumstances the principal debtor had executed some other instrument on which the surety might sue him and become his specialty creditor, he would have remained bound (*n*).

So where a surety executed a deed prepared by the creditor which appeared to contain a joint and several covenant by two co-sureties, but no other signature was provided by the creditor as co-surety, the surety who signed was discharged (*o*).

Where a person gave a promissory note as surety, upon an agreement that the amount should be advanced to the principal debtor by draft at three months, and the creditor, without the concurrence of the surety, paid the amount at once, the surety was discharged, on the ground of the variation of the agreement (*p*). Where persons agreed to become sureties for a contractor who was undertaking certain works, and the contract was that three-fourths of the work, as finished, should be paid for periodically and the remainder upon completion, payments having been made exceeding three-fourths of the work done, the sureties were released (*q*). The dealing with a security for a debt in a due course of management, as by selling mortgaged property, though without the knowledge of the surety, will not release him (*r*).

Where, as in *Dering v. E. of Winchelsea* (*s*), there is a bond of suretyship for the fidelity of an officer, and the nature of the office or its duties are materially changed so

(*m*) *Ibid.* *Culvert v. London Dock Co.*, 2 Keen, 638.

(*n*) *Cooper v. Evans*, 4 Eq. 45.

(*o*) *Evans v. Bremridge*, 2 K. & J. 174; 8 De G. M. & G. 101.

(*p*) *Bonser v. Cox*, *sup.*

(*q*) *Calvert v. London Docks Co.*, *sup.*; *Exp. Rushforth*, 10 Ves. 409.

(*r*) *Taylor v. Bank of N. S. W.*, 11 App. C. 596.

(*s*) 1 Cox, 318.

as to effect the peril of the sureties, the bond will be avoided (*t*). It is necessary, however, that the alteration should be such as to materially affect the surety (*u*). It may also be that the wording of the bond is extensive enough to continue the liability notwithstanding a material change (*v*).

Where a creditor takes a second security in satisfaction of the first, the surety is discharged (*x*). But the taking of an additional security not in lieu of the former one has no such effect (*y*).

III. *The Effects of Releases and Compositions.*

Release or composition discharges surety, unless surety concurs or the contrary is stipulated, or surety has already partially paid the debt,

1. *Release of, or composition with, the debtor.*

Where a creditor releases, or compounds with the principal debtor, without the concurrence of the surety, and although it may be done by mistake or for the benefit of the surety, he will thereby discharge the surety unless there is a stipulation to the contrary (*z*). It would be a manifest fraud on the debtor to profess to release him, and then to sue the surety, who could forthwith sue the debtor (*a*). If, however, the surety has, previously to the release given to the debtor, paid part of the debt and given security for the remainder, the general rule will not apply. The liability of the surety will then rest on the security given, rather than on the original contract, and will remain in force (*b*).

(*t*) *Bonar v. Macdonald*, 3 H. L. 226.

(*u*) *Sanderson v. Aston*, 8 Eq. L. R. Ex. 73; *Skillett v. Fletcher*, 1 L. R. C. P. 217.

(*v*) *Oswald v. M. of Berwick*, 5 H. L. 856.

(*x*) *Clarke v. Henty*, 3 Y. & C. Ex. 187. See *Swire v. Redman*, 1 Q. B. D. 586.

(*y*) *Gordon v. Calvert*, 4 Russ. 581.

(*z*) *Exp. Smith*, 3 Bro. C. C. 1; *Davidson v. MacGregor*, 8 M. & W. 755; *Cragoe v. Jones*, 8 L. R. Ex. 81.

(*a*) *Nevill's Case*, 6 Ch. 47.

(*b*) *Hall v. Hutchons*, 3 My. & K. 426.

A surety may, by further contract with the creditor, convert himself, in relation to the debt for which he was surety, into a principal debtor; and then, upon a release being given to the party who was in the first instance the principal, he will lose the benefit of the doctrine that the release of the principal releases the surety (*c*).

or surety has converted himself into the principal debtor.

A creditor, if he has given an absolute legal or equitable release for a debt, cannot reserve his right to proceed against the sureties (*d*). Where, however, a release can be construed as a covenant not to sue, a reservation of remedies against the surety is admissible. The covenant operates only as far as the rights of the surety are not affected; and since the surety remains liable, he retains his remedies over against the principal debtor (*e*).

Right against surety cannot be reserved after absolute release. *Secus*, in case of a covenant not to sue.

A surety is not discharged by the creditor's signing the certificate of a bankrupt debtor after proving his debt, although the surety may have given him notice not to sign it (*f*).

Surety not released by signature of bankrupt's certificate.

2. Release of, or composition with, one of two or more co-sureties.

It is a settled principle that the release or discharge of one surety by a creditor operates as a discharge of the others, and this notwithstanding that it arises from a mistake of law (*g*).

Release of one surety discharges others;

It has, however, been held in equity that a mere composition with one of the sureties would not have that effect, and that at the same time the remedy against the co-surety might be expressly reserved (*h*). In such cases the co-surety is not damnified; for the creditor, by giving a discharge to one surety for the proportion which he was liable to contribute towards payment of the debt, has no

not so composition;

(*c*) *Read v. Lowndes*, 23 Beav. 361.

774; *Green v. Wynn*, 4 Ch. 204.

(*d*) *Nicholson v. Revill*, 4 Ad. & E. 675; *Webb v. Hewitt*, 3 K. & J. 438.

(*f*) *Browne v. Carr*, 7 Bing. 508, 514.

(*g*) *Cheetham v. Ward*, 1 B. & P. 633; *Nicholson v. Revill*, *sup.*

(*e*) *Bateson v. Gosling*, 7 L. R. C. P. 9; *Bailey v. Edwards*, 4 B. & S.

(*h*) *Exp. Gifford*, 6 Ves. 805.

right to proceed against the other sureties for more than their proportion of it (*i*).

nor a covenant not to sue.

If in this case, also, the release can be construed as a mere covenant not to sue, it will not operate as a discharge of the co-sureties (*k*). And if the sureties contract *severally*, the release of one does not discharge the other (*l*), unless the sureties' right to contribution has been lost or injuriously affected by the creditor's act.

IV. *Continuing Suretyship or Guarantee.*

Cases in which the suretyship is not for a definite debt, but for a possible but uncertain liability, such as for discounting bills, or for the due performance of certain duties, give rise to special questions, especially with regard to revocation.

Guarantee not revoked by death, but usually revocable before liability incurred.

Such contracts are not necessarily revoked by the death of the surety (*m*), nor, if there be two co-sureties, does the death of one discharge the survivor from future liability (*n*); but they are usually revocable at any time before a liability has been incurred in respect thereof (*o*); and they have been treated in equity as revoked when it was the duty of the representatives of the guarantor, with the knowledge of the creditors to whom the guarantee was given, to have given notice to determine the same (*p*).

Secus, guarantee for honesty of servant.

A person, however, who by a continuing guarantee becomes surety for the honesty of a servant, cannot ordinarily, during the continuance of the service, discharge himself by merely giving notice that he will be no longer liable (*q*).

(*i*) *Stirling v. Forrester*, 3 Bligh. 591.

(*k*) *Price v. Barker*, 4 E. & B. 760; *Thompson v. Lack*, 3 C. B. 540, 552.

(*l*) *Ward v. Nat. Bk. of New Zealand*, 8 App. C. 755.

(*m*) *Bradbury v. Morgan*, 1 H. & C. 249; *Lloyd's v. Harper*, 16 Ch.

D. 290.

(*n*) *Beckett v. Addyman*, 9 Q. B. D. 783.

(*o*) *Offord v. Davies*, 12 C. B. N. S. 748. But see 31 Law Journ. Exch. 462.

(*p*) *Harriss v. Fawcett*, 8 Ch. 866.

(*q*) *Calvert v. Gordon*, 7 B. & C. 809; *Gordon v. Calvert*, 4 Russ. 581.

But if the guarantor discovers acts of dishonesty in the person for whom he has made himself answerable, he can at once revoke his guarantee (*r*).

Where a master, who has in his employ a servant whose conduct has been guaranteed, discovers that the servant has been guilty of dishonesty, but nevertheless without the knowledge or consent, express or implied, of the guarantor, continues such servant in his employ, he cannot claim anything from the guarantor in respect of subsequent acts of dishonesty (*s*). But it seems that if in such a case the person suing the guarantor is not in a position which gives him power to dismiss the employée, the guarantee remains in force (*t*).

Master may lose benefit of guarantee by concealment.

V. *Contribution between Co-sureties.*

In the important case of

DERING v. THE EARL OF WINCHELSEA

[1 Cox, 318; 1 W. & T. L. C. 106]

it was laid down that the *right of contribution between co-sureties depended on the general principles of equity, and not on the form or nature of the contract between the parties.* In that case, Thomas Dering, having been appointed collector of Customs duties, entered into bonds to the Crown with three sureties for the due performance of his office. His brother, Sir Edward Dering, together with the Earl of Winchelsea and Sir John Rous, became sureties for him accordingly. Thomas Dering and Sir E. Dering executed one joint and several bond in a penalty of £4,000, Thomas Dering and the Earl of Winchelsea executed another similar bond, and Thomas Dering and Sir John Rous a third; all conditioned alike upon the due performance

Principle of contribution in equity.

(*r*) *Burgess v. Eve*, 13 Eq. 457.
(*s*) *Phillips v. Foxhall*, 7 L. R.

Q. B. 666.
(*t*) *Lawder v. L.*, 7 I. R. C. L. 57.

by Thomas Dering of his duty as collector. Thomas Dering being in arrear to the Crown to the amount of £3,883 14s. 0d., the Crown put the first bond in suit against Sir E. Dering, and obtained judgment thereon for that sum. Thereupon Sir E. Dering filed this bill against the Earl of Winchelsea and Sir John Rous, claiming from them contribution towards the sum so recovered against him. It was held by Lord Chief Baron Eyre that there must be equal contribution by the defendants. Notwithstanding that the parties were bound in different instruments, they were co-sureties for the same principal, and in the same engagement, and were bound in conscience to contribute proportionally to the penalties of the bonds. In that case the penalties were equal, but the principle would have been the same if they were bound in different sums, except that contribution in that case could not be required beyond the sum for which they had become bound.

In *Stirling v. Forrester* (u), Lord Redesdale again held that the right and duty of contribution was founded in doctrines of equity; that the principle was the same as in cases of average, and that it would be against equity for a creditor to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment; he was bound, seldom by contract, but always in conscience, as far as he was able, to put the party paying the debt upon the same footing with those who were equally bound. The principle may now, therefore, be considered as firmly established. It seems, even, that the right of a surety to enforce contribution will not be affected by his ignorance at the time he became surety that there were co-sureties (x).

Principle not
applicable
where sureties

Such transactions as that in *Dering v. E. Winchelsea* must, however, be distinguished from those in which

(u) 3 Bligh. 590.

(x) *Craythorne v. Swinburne*, 14 Ves. 160, 163.

sureties are bound by different instruments for distinct portions of a debt due from a principal. If the suretyship of each is a separate and distinct transaction, the doctrine does not apply, and there will be no right of contribution among the sureties (*y*). A surety is not entitled to call upon his co-surety for contribution until he has paid more than his proportion of the debt due by the creditor, even though the co-surety has not been required to pay anything, unless, indeed, the co-surety has been released by the creditor (*z*).

bound for
different
portions of
the debt.

Although the principle of contribution is a constructive doctrine of equity and not founded upon contract, still a person may by contract qualify or take himself out of the reach of the principle: for instance, where three co-sureties agreed among themselves that in case of the failure of the principal debtor to pay they would each contribute his respective part, one of them having paid the debt and another become insolvent, it was held that the remaining one could only be required to contribute one-third, not one-half, which, in the absence of such an agreement, would have been his liability (*a*).

Principle may
be qualified
or excluded
by contract.

Similarly a person may contract himself entirely out of the principle, and become a merely collateral surety by limiting his liability to payment in case of the default of the principal and other sureties (*b*), and parol evidence is admissible to show what the real contract was, so as to avoid the application of the doctrine of contribution (*b*).

Parol evi-
dence admis-
sible.

Though by the law merchant the indorsers of a bill or note are liable in succession, a subsequent indorser having a right to indemnity against all that are prior to him, all the facts of the case will be considered; and if it appears that the indorsers were in fact in the position of co-sureties,

(*y*) *Coope v. Twynam*, 1 T. & R. 426; *Arcedeckne v. Howard*, 20 W. R. 879.

(*z*) *Davies v. Humphreys*, 6 M. &

W. 153; *Exp. Snowden*, 17 Ch. D 44.

(*a*) *Swain v. Wall*, 1 Ch. Rep. 80.

(*b*) *Craythorne v. Swinburne*, *sup.*

they will be liable to equal contribution; there will be no priority (*d*).

Sureties entitled to securities.

Sureties who have paid the debt are not only entitled to contribution from the other sureties, but also to the benefit of any security which any of them may have taken from the principal debtor by way of indemnity (*e*), unless, at least, there was originally a contract for the special indemnity to one of the number (*f*). The principle is the same as that more fully expounded in the next section.

VI. *The Right of Surety to Securities.*

A surety is entitled, on the payment of the debt, to all the securities which the creditor has against the principal debtor, whether given at the time of the contract or subsequently, and whether given with or without the knowledge of the surety or of the principal (*g*). The same right appertains to sureties who become such by indorsement of a bill of exchange (*h*).

Loss of securities by creditor discharges surety.

Consequently, if a creditor who has had, or ought to have had, such securities, loses them, or suffers them to get back into the possession of the debtor, or fails through neglect to make them effectual, as by failing to give proper notice, the surety will, to the extent of such security, be discharged (*i*). If the security has become worthless otherwise than by the act or neglect of the creditor, its loss, of course, effects no discharge (*k*).

Surety en-

A surety who pays off a debt is entitled not only to all

(*d*) *Macdonald v. Whitfield*, 8 App. C. 733.

(*e*) *Swain v. Wall*, 1 Ch. Rep. 81.

(*f*) *Cooper v. Jenkins*, 32 Beav. 337; *Steel v. Dixon*, 17 Ch. D. 825.

(*g*) *Mayhew v. Crickett*, 2 Swanst. 185; *Pearl v. Deacon*, 24 Beav. 186; 1 De G. & J. 461; *Lake v. Brutton*, 18 Beav. 34; 8 De G. M. & G. 440;

Pledge v. Buss, Johns. 663, 668.

(*h*) *Duncan v. N. & S. W. Bank*, 6 App. C. 1; 11 Ch. D. 88.

(*i*) *Capel v. Butler*, 2 S. & S. 457; *Law v. E. I. Co.*, 4 Ves. 824; *Strange v. Fooks*, 4 Giff. 408.

(*k*) *Hardwick v. Wright*, 35 Beav. 133; *Rainbow v. Juggins*, 5 Q. B. D. 138, 422.

the equities which the creditor could have enforced against the principal debtor, but also to those available against persons claiming under him. Thus where A. mortgaged an estate to C., and B. became A.'s surety for the debt, and afterwards A. mortgaged the estate again to D., who had notice of the first mortgage, the first mortgage being paid off partly by B., he was held to have priority over D. for the amount so paid, notwithstanding that D. got a transfer of the legal estate (*l*).

titled to all equities against persons claiming under the debtor;

On the other hand, if a surety discharges an obligation at less than its full amount, he cannot, as against the principal debtor, claim the whole amount, but only what he has actually paid in discharge (*m*).

can only claim what he actually pays.

If a surety obtains from the principal debtor a counter-security for the liability which he has undertaken, he must bring into hotch-pot for the benefit of the co-sureties whatever he receives from that source, even though he consented to be surety only upon the terms of having the security, and the co-sureties were at the time of the contract ignorant of the security having been given (*n*).

The principle has been applied to almost every kind of security. Where the creditor obtained a judgment against the principal debtor, and the surety paid the debt, it was held that he was entitled to an assignment of the judgment (*o*). But it was questioned whether such assignment was of any effect, since the payment had been considered to discharge the judgment, and so make it valueless (*p*).

Principle applies to all kinds of securities. Judgments.

Similarly, where a debt was secured by a bond, it was one time considered that a surety who paid it was entitled to an assignment of the debt and bond. But in *Copis v. Middleton* (*q*), and *Hodgson v. Shaw* (*r*), it was decided that

Bonds.

(*l*) *Drew v. Lockett*, 32 Beav. 499.

(*m*) *Reed v. Norris*, 2 My. & Cr. 361, 375.

(*n*) *Steel v. Dixon*, *sup.*; *Atkins v. Arcedeckne*, 24 Ch. D. 709.

(*o*) *Parsons v. Briddock*, 2 Vern.

608.

(*p*) *Armitage v. Baldwin*, 5 Beav. 278; *Hodgson v. Shaw*, 3 My. & K. 183, 191.

(*q*) 1 T. & R. 229.

(*r*) *Sup.*

on payment of the debt the bond ceased to exist, and was no longer available as a security.

19 & 20 Vict.
c. 97.

By the Mercantile Law Amendment Act, 1856 (*s*), however, the law both as to judgments and bonds was established in favour of sureties, it being, by s. 5 thereof, enacted that a surety who pays off a debt so secured shall be entitled to have assigned to him every judgment, specialty, or security which shall be held by the creditor in respect of such debt, whether such judgment, &c., shall or shall not at law be deemed to have been satisfied by the payment of the debt. This Act is applicable to a contract made before it was passed, where payment has been made by a surety since that time (*t*). A surety who has satisfied a judgment is entitled to the benefit of the Act though he may not in fact have obtained an assignment of the judgment (*u*).

A creditor who takes out execution against the debtor is a trustee of it for all parties interested. If, therefore, he withdraws it without the knowledge of the sureties, he thereby discharges them (*x*). So, also, if he loses the benefit of it by neglect (*y*).

Further
advance on
security.
Distinct
securities for
separate
debts.
Tacking.

Where a creditor advances a further sum upon a security, a surety for the original debt is entitled to the security on paying that debt only (*z*). But where separate debts are due upon distinct securities from the principal debtor to the creditor, the latter will not lose his right to tack from the fact that a third party who has become surety for one of the debts has paid off that debt (*a*), unless, at any rate, the mortgagee has been guilty of some concealment or misrepresentation (*b*).

(*s*) 19 & 20 Vict. c. 97.

(*t*) *In re Cochran's Estate*, 5 Eq. 209.

(*u*) *Lightbown v. McMyn*, 33 Ch. D. 575.

(*x*) *Mayhew v. Crickett*, 2 Swanst. 185, 190.

(*y*) *Watson v. Allcock*, 1 S. & G. 319; 4 De G. M. & G. 242.

(*z*) *Newton v. Chorlton*, 10 Ha. 646; *Forbes v. Jackson*, 19 Ch. D. 615, not following *William v. Owen*, 13 Sim. 597.

(*a*) *Farebrother v. Wodehouse*, 23 Beav. 18.

(*b*) *Bowker v. Bull*, 1 Sim. N. S. 29.

CHAPTER VII.

MARRIED WOMEN.

SECT. I.—EQUITABLE DOCTRINES AS TO MARRIED WOMEN.

*General Comparison of Law and Equity.*I. *Separate Estate in Equity.**Restraint on Anticipation.**Pin-Money.**Paraphernalia.*II. *The Equity to a Settlement.*1. *The Nature of the Right.*2. *Out of what Property it can be claimed.*3. *Waiver.*4. *How barred.*5. *Amount settled.*6. *Form of Settlement.*7. *How far binding on Creditors.**Reduction into Possession by Husband.*III. *Fraud on Marital Rights.**General Comparison of Law and Equity.*1. *Position of married women at common law.*

(1.) By the common law, a husband on his marriage became entitled absolutely to all his wife's chattels personal in possession. If he reduced her choses in action into possession during the coverture, he similarly became entitled to them; if he survived his wife without having reduced them into possession, he was entitled to recover

Husband's
rights in his
wife's pro-
perty.
Personalty.

Realty.

them as her administrator on taking out administration. But if he died before his wife without having reduced them into possession, the wife was entitled. He also acquired full power over her legal chattels real, in possession and reversion; but if he died before his wife without having aliened them, they survived to her. He was likewise entitled to receive the rents and profits of the wife's real estate during their joint lives.

Such were the extensive rights with which a husband was by law invested in consideration of the obligation which he incurred by the marriage of maintaining his wife. Yet at the same time the wife had no legal remedy in case of his refusing or neglecting to perform the duties in consideration of which he acquired these rights, nor could she claim any release in the case of his insolvency or bankruptcy. The property which had been hers, however large, was as much at the mercy of his creditors as of himself.

Wife could
not be sued.

(2.) On the other hand, the wife could not be sued in any way, even for necessities. In certain cases her contracts for necessities might bind her husband, but never herself or the property which had been hers. Her separate existence was not contemplated; it was merged by the coverture in that of her husband, and she was no more recognized in Courts of law than a *cestui que trust* or a mortgagor (a).

2. *The position of married women in equity.*

Such being the rigid rules of law as to the status of a married woman, it is not surprising that Courts of equity should have found ample ground for interference, and should have established a system of doctrines more consonant with reason and justice.

These doctrines are reducible to two leading principles—first, the recognition by equity of the separate estate of a

(a) Blackstone, II., 433, 435; *Murray v. Barlee*, 2 My. & K. 220, Coke upon Littleton, 300a, 351b; 222; *In the goods of Harding*, 2 P. Betts v. Kington, 2 B. & Ad. 277; & D. 394.

married woman, with reference to which she is regarded and treated as if she were a *feme sole*; secondly, the principle which requires a husband who receives property in the right of his wife to make a proper settlement thereout on his wife and children.

Until quite recently, the assistance thus afforded to married women by Courts of equity constituted one of the most extensive and beneficial branches of their jurisdiction, and the subjects falling thereunder called for exposition in considerable detail; and though the Legislature, so long ago as 1870, so far recognized the hardship often occasioned by the antiquated doctrines of the common law as to provide legal protection in certain cases for the interests of married women, the statute then passed (*b*) was of very limited application, and scarcely diminished the importance of the equitable jurisdiction in question. The Married Women's Property Act of 1882 (*c*), however, by the sweeping enactment that "a married woman shall be "capable of acquiring, holding and disposing by will or "otherwise, of any real or personal property as her "separate property, in the same manner as if she were "a *feme sole*," has at one stroke reduced the importance of this branch of equity to a very considerable degree. The possession of property by a married woman free from the control of her husband, which was previously exceptional and dependent upon the doctrines deducible from a series of decisions in the Court of Chancery, at once became a general statutory right, so that thenceforth the first of the principles above stated remained of importance only for the limited purposes hereafter to be indicated. Still more completely was the principle which recognized a wife's equity to a settlement undermined, remaining, as we shall presently see, applicable only to women married prior to the commencement of the Act, and as to them affecting

(*b*) 33 & 34 Vict. c. 93.

(*c*) 45 & 46 Vict. c. 75.

only a small and rapidly vanishing class of proprietary interests.

Under these circumstances, it becomes necessary for the writer, in dealing with the subject of married women's property, to concern himself mainly with the statute which now covers almost the whole of the questions concerned. And though for the present, at least, the equitable doctrines cannot be ignored, their exposition may be reduced in proportion as has been their importance.

The most convenient method of dealing with the subject under the altered conditions will be, first, to review the equitable doctrines in the new light in which the statute law has placed them, and then to turn to the enactment itself, adding such comments and explanations as may be required.

Our first inquiry will be as to the manner of creating and as to the characteristics of equitable separate estate.

I. *Separate Estate in Equity.*

Creation of
separate
estate.

By a series of important decisions it was long ago determined that equity would treat a married woman as capable of owning property of any description to her own use, independently of her husband, and would hold her entitled to enjoy it with all its privileges and incidents including the *jus disponendi* (d).

Depends on
intention.

In order that property belonging to a woman at the time of her marriage, or subsequently conferred on her, may be deemed her equitable separate estate, it is requisite that equity should be able to discern either from the terms of the instrument through which she receives the property, or from the nature of the transaction by which she acquires it, an intention that she should have the sole use thereof.

(d) *Fettiplace v. Gorges*, 1 Ves. jr. 46.

If, in that case, it is in the hands of trustees, they will be held trustees for her. And if no trustees have been appointed equity will treat the husband as her trustee (*e*).

No particular form of words, whether in a settlement or will, is required to vest property in a married woman to her separate use, as long as the intention to give her such an interest in opposition to the legal rights of her husband is clear and unequivocal (*f*).

Form of words immaterial.

The following expressions have been held to be sufficient to exclude the marital rights of the husband—a gift or settlement to the wife, or to trustees for her, for her “sole and separate use” (*g*); “for her separate use” (*h*); “for her own use, and at her own disposal” (*i*); “for her own use, independent of her husband” (*k*); “for her own use and benefit, independent of any other person” (*l*); “that she should receive and enjoy the issue and profits” (*m*); or where there is a direction that the “interests and profits be paid to her, and the principal to her, or to her order by note in writing under her hand” (*n*); or “her receipt to be a sufficient discharge” (*o*); or that the husband “is to have no control” (*p*).

Illustrations.

On the other hand, since an unequivocal intention to exclude the husband’s rights must be shown, it has been held that no separate use is created by a direction “to pay to a married woman and her assigns” (*q*); or to pay a fund “into her own proper hands to and for her own use and benefit” (*r*); or where property is given “to her own

Intention must be clear.

(*e*) *Newlands v. Paynter*, 4 My. & Cr. 408; *Parker v. Brooke*, 9 Ves. 583; *Rich v. Cockell*, 9 Ves. 375.

(*f*) *Stanton v. Hall*, 2 R. & My. 180.

(*g*) *Parker v. Brooke*, *sup.*

(*h*) *Massy v. Rowen*, 4 L. R. H. L. 288, 294.

(*i*) *Inglefield v. Coghlan*, 2 Coll. 247.

(*k*) *Wagstaffe v. Smith*, 9 Ves. 520.

(*l*) *Margetts v. Barringer*, 16 Sim. 568.

(*m*) *Tyrrell v. Hope*, 2 Atk. 558.

(*n*) *Hulme v. Tenant*, 1 Bro. C. C. 16.

(*o*) *Lee v. Prieaux*, 3 Bro. C. C. 381.

(*p*) *Edward v. Jones*, 14 W. R. 815.

(*q*) *Lumb v. Milnes*, 5 Ves. 517.

(*r*) *Tyler v. Lake*, 2 R. & My. 183.

use and benefit" (s); "to her absolute use" (t); or "to her own proper use and benefit" (u); or "to be under her sole control" (x).

Distinction
between gifts
to *feme sole*
and *feme*
covert.

A distinction must be observed between the effect of certain words used in a gift to a woman already married, and the same words in a gift to a *feme sole* or widow. The expression "*separate use*" has a technical meaning, and is sufficient, whether the gift be to a married or to an unmarried woman, with or without the intervention of trustees, to impress the property given with the character of separate estate (y). But the expression "*sole use*" has no such technical meaning, and its interpretation depends on circumstances. The result of the cases is that if the words "*sole use and benefit*" are applied to a gift to a woman already married, they will suffice to exclude the husband's marital right, and to create a separate estate (z). Also if the intended beneficiary be a woman about to marry, or there are other expressions in the instrument from which it can be gathered that a future marriage was contemplated by the settlor or donor, these words will import exclusion of the husband, and will create a separate estate (a). Further, if in any case these words are used, and the property is at the same time vested in trustees, it seems that they will be considered sufficient to create a separate estate (b). But if the gift is to a woman unmarried, and not in contemplation of marriage, or to a widow, and without the interposition of trustees, the words "*sole use and benefit*" will not import exclusion of a future husband, and will not suffice to impress on the property the character of separate estate (c).

(s) *Kensington v. Dollond*, 2 My. & K. 184.

(t) *Exp. Abbot*, 1 Dea. 338.

(u) *Blacklow v. Laws*, 2 Ha. 49.

(x) *Massey v. Parker*, 2 My. & K. 174.

(y) *Massy v. Rowen*, 4 L. R. H. L. 288.

(z) *Inglefield v. Coghlan*, 2 Coll. 247; *Green v. Britten*, 1 De G. J.

& S. 649; *Hartford v. Power*, 2 I. R. Eq. 212; *Bland v. Dawes*, 17 Ch. D. 794.

(a) *Exp. Ray*, 1 Madd. 199, 207; *In re Tarsey's Trust*, 1 Eq. 561; *Exp. Killick*, 3 M. D. & De G. 480.

(b) *Adamson v. Armitage*, 19 Ves. 416.

(c) *Gilbert v. Lewis*, 1 De G. J.

Presents from a husband to his wife will be deemed Presents to wife. separate estate where they are made absolutely and not merely to be worn as personal ornaments (*d*). So a husband may make himself trustee for his wife of property to be held as her separate estate (*e*). But as regards real estate, a mere written declaration by a husband without his wife's concurrence will not suffice to impress upon it the character of separate estate, since the husband has not such an interest in the property as enables him to create a trust therein (*f*). It seems that a gift from a stranger to a married woman, though not expressed to be for her separate use, would be considered separate estate (*g*).

The savings which a married woman may make out of Savings out of separate property. separate property are considered as separate estate (*h*). She has the same power with respect to them, and they are subject to the same liabilities (*i*). Similarly, arrears of separate estate in the hands of trustees will be considered as retaining their original character (*k*). Where, also, a husband living separate from his wife remits money to her for her support and maintenance, such money, and any savings which the wife may make out of it, will be considered separate estate (*l*).

A married woman is entitled as to separate estate to any Outlay on separate property. outlay made by her husband on real property settled to her separate use—for instance, to houses which he builds thereon, or improvements made (*m*).

Having thus illustrated how under the protection of equitable tribunals married women acquired property to their separate use, free from marital control, the next con-

& S. 38; *Lewis v. Matthews*, 2 Eq. 177; *Massy v. Rowen*, *sup.*; *Hartford v. Power*, *sup.*

(*d*) *Graham v. Londonderry*, 3 Atk. 393; *Grant v. G.*, 34 Beav. 623.

(*e*) *Mews v. M.*, 15 Beav. 529.

(*f*) *Dye v. D.*, 13 Q. B. D. 147.

(*g*) *Graham v. Londonderry*, *sup.*

S.

(*h*) *Gore v. Knight*, 2 Vern. 535; *Askew v. Rooth*, 17 Eq. 426.

(*i*) *Butler v. Cumpston*, 7 Eq. 16.

(*k*) *Ashton v. McDougall*, 5 Beav. 56.

(*l*) *Brooke v. B.*, 25 Beav. 342; *Haddon v. Fladgate*, 1 Sw. & Tr. 48.

(*m*) *Barrack v. McCulloch*, 3 K. & J. 110, 124; *Grant v. G.*, *sup.*

B B

sideration is to inquire as to the powers they possess over such property, and the liabilities to which it is subject.

Powers of alienation.

Putting out of view for the present that special class of cases in which by the operation of another device of equity a married woman is expressly restrained from alienation, the following rules briefly indicate her powers of voluntary disposition respecting the different kinds of separate estate.

Personalty settled absolutely alienable.

As to personalty settled upon a married woman for her separate use, it is well established that she may enjoy it with all its incidents, and may dispose of it either by acts *inter vivos* or by will (*n*); and this whether the property be in possession or reversion (*o*).

Real estate.

As to real estate she has a complete power of disposition over the rents and profits (*p*); and she may dispose of the equitable fee at her pleasure (though there may be no express power of appointment given) either by will or deed, which need not be acknowledged under 3 & 4 Will. IV. c. 74 (*q*); and she has this power whether or not the estate is vested in trustees (*r*).

She may transfer her interest also as well to her husband as to anyone else (*s*), though a husband so receiving property must be prepared to show that it was clearly intended as a gift (*t*). Moreover, a disposition by a wife of her equitable estate in fee simple is sufficient to completely bar and exclude the estate which on her death would otherwise have passed to the husband by the curtesy (*u*). For the alienation of the legal fee, however, a deed acknowledged under the said statute and the concurrence of the persons in whom the legal estate was vested, remained necessary.

(*n*) *Fettiplace v. Gorges*, 1 Ves. jr. 46; 3 Bro. C. C. 8; *Rich v. Cockell*, 9 Ves. 369; *Willock v. Noble*, 7 L. R. H. L. 580.

(*o*) *Sturgis v. Corp.*, 13 Ves. 190; *Stamford, &c. Bank v. Ball*, 4 De G. F. & J. 310, *infra*, p. 392.

(*p*) *Stead v. Nelson*, 2 Beav. 245; *Major v. Lansley*, 2 R. & M. 357.

(*q*) *Taylor v. Meads*, 4 De G. J. & S. 597.

(*r*) *Hall v. Waterhouse*, 13 W. R. 633.

(*s*) *Grigby v. Cox*, 1 Ves. sr. 518.

(*t*) *Rich v. Cockell*, 9 Ves. 375.

(*u*) *Appleton v. Rowley*, 8 Eq. 139; *Cooper v. Macdonald*, 7 Ch. D. 288.

It may be here conveniently mentioned that if a husband, in exercise of his legal right, assigned his wife's separate estate to a purchaser for value without notice, she had no remedy against the purchaser (*x*). Assignment by husband.

It is scarcely necessary to say that where there is a gift absolutely to a married woman, but only the life interest is limited to her separate use, the *corpus* of the estate, being unaffected by the separate use, is not in her power, and an attempted devise thereof would be invalid (*y*); but after some conflict of decision it was ultimately established that where there is a gift to a wife to her separate use for life, remainder as she shall, notwithstanding her coverture, by deed or will appoint, it will be treated as an absolute gift to her sole and separate use, so as to fully vest in her the entire *corpus* for all purposes (*z*). Life interest with power of appointment.

A wife may, in effect, alienate the income of her separate estate by expressly or impliedly authorizing her husband to receive it. And if she does so, she cannot afterwards call upon him to account for the same (*a*); nor can she recover it from trustees who have paid the husband with her acquiescence (*b*). But in order thus to deprive a wife of the arrears of income on the ground of her acquiescence, her intention to permit the husband to receive the income must be clearly shown. In the absence of this she will be entitled to all the income in arrear, not confined to one year as in the case of arrears of pin-money (*c*). Permitting husband to receive income.

The law as to the liability of separate estate in equity to the debts and engagements of married women has steadily and continually developed in the direction of favouring creditors, and treating the separate estate just as the absolute property of a man would be treated. Liability of separate estate to debts.

- (*x*) *Dawson v. Prince*, 4 De G. & J. 41. D. 194.
 (*y*) *Troutbeck v. Boughey*, 2 Eq. G. 599.
 534. (*b*) *Rowley v. Unwin*, 2 K. & J. 138.
 (*z*) *London Chartered Bank of Australia v. Lempriere*, 4 L. R. P. C. 572; *Bishop v. Wall*, 3 Ch. D. 587;
Parker v. Brooke, 9 Ves. 583.

Fraud.

1. The strongest case for attaching liability to separate estate is where a married woman has been guilty of fraud. Long before the capability of a married woman to bind her separate estate by contracts was recognised, it was settled that she was capable of committing fraud, and was liable to the usual consequences of such an act. Thus in *Savage v. Foster* (*d*), where a married woman knowing her own title to property, suffered a purchaser to acquire it for valuable consideration by concealing her title, she was not allowed afterwards to set up her title against the purchaser. In cases of fraud, moreover, property settled on her for life with a general power of appointment which she exercises, is, equally with property settled on her absolutely, liable to supply any deficiency (*e*).

Breach of trust.

2. A married woman will render her separate estate liable by *actively* concurring with her trustees in a breach of trust (*f*), and she cannot call upon the trustees to replace it (*g*). So by herself committing a breach of trust in respect of other property under the trust (*h*) she renders her separate estate liable, unless she is restrained from anticipation (as to which generally, see *infra*, p. 375 *et seq.*); and, notwithstanding such restraint, arrears of income under the trust are also liable (*i*), but not future income (*j*).

Liability to debts.

3. It was long after the recognition for many purposes of separate estate, that a married woman was first deemed capable of contracting debts in respect of such estate; and it is only quite recently that her capacity to do so has been fully accepted with all its consequences.

Specialty debts.

As might have been expected, the first step was to hold that specialty debts, such as those secured by a bond under her hand and seal, should be binding on her to the extent

(*d*) 9 Mod. 35.(*e*) *Vaughan v. Vanderstegen*, 2 Drew. 165.(*f*) *Brewer v. Swirles*, 2 Sm. & G. 219; *Jones v. Higgins*, 2 Eq. 538; *Sawyer v. S.*, 28 Ch. D. 595.(*g*) *Crosby v. Church*, 3 Beav. 485.(*h*) *Olive v. Carew*, 1 J. & H. 199.(*i*) *Pemberton v. M'Gill*, 1 Dr. & Sm. 266.(*j*) *Ibid.*; *Olive v. Carew*, *supra*.

of her separate property. As to this the case of *Hulme v. Tenant* (*k*) is a leading authority.

4. Then the principle was extended to instruments of a less formal character, such as a bill of exchange accepted (*l*) or endorsed (*m*), and to a promissory note (*n*). Negotiable instruments.

5. The next step was its application to general written agreements—for instance, an agreement to pay additional rent for a house (*o*); also to the payment of the costs of a solicitor whom she had instructed (*p*). Written agreements generally.

6. Up to this point the principle on which the separate estate was held to be liable was often represented to be that the written engagements in question operated as appointments of the settled property, and acquired their validity as such, rather than as contracts; and as long as it rested on this ground it is clear that no liability could arise from merely verbal contracts. But by many authoritative decisions this view of the question has been completely exploded (*q*), and it is now well established that separate estate will be bound by general verbal engagements, whether in the form of express contract or of the nature of an *assumpsit* (*r*); though of course the fact of the party being a married woman will not dispense with the necessity of a written contract, where it is otherwise required (*s*). Verbal contracts.

7. It yet remained to be decided whether a married woman's general engagements would bind property settled on her for life with a general power of appointment which she has exercised. At length, in an important case already referred to (*t*), it was held that where such general power of appointment was exerciseable by *deed or will*, the pro- Life estate with general power of appointment by deed or will.

(*k*) 1 Bro. C. C. 16.

(*l*) *Stuart v. Kirkwall*, 3 Madd. 387; *Owen v. Homan*, 4 H. L. 997.

(*m*) *M'Henry v. Davies*, 6 Eq. 462; 10 Eq. 88.

(*n*) *Bullpin v. Clarke*, 17 Ves. 365; *Field v. Sowle*, 4 Russ. 112.

(*o*) *Master v. Fuller*, 4 Bro. C. C. 19; 1 Ves. 513.

(*p*) *Murray v. Barlee*, 3 My. & K. 210.

(*q*) *Murray v. Barlee*, 3 My. & K. 210, 223; *Owens v. Dickenson*, Cr. & Ph. 53.

(*r*) *Vaughan v. Vanderstegen*, *sup.*; *Johnson v. Gallagher*, 3 De G. F. & J. 494; *Matthewman's Case*, 3 Eq. 787.

(*s*) *Re Sykes' Trust*, 2 J. & H. 415.

(*t*) *London Chartered Bank, &c. v. Lempriere*, 4 L. R. P. C. 572.

By will only. perty might be charged by her act. It has more recently been decided, where property was settled on a married woman for her separate use for life, with remainder to such persons as she should *by her will* appoint, she having made a testamentary appointment, that the property was liable to the payment of her debts, as if it had been settled on her absolutely (*u*). It will be observed that here the power of appointment could only be exercised *by will*. *A fortiori*, therefore, would property be liable which was subject to appointment by will or deed. This decision, as we shall see, has been confirmed by the Act of 1882 (*x*). Of course it will also be noted that such liability only arises in cases where the power has been exercised; it cannot affect persons entitled under a gift over in default of appointment.

Extent of the liability.

8. The extent of the liability was by *Hulme v. Tenant* (*xx*) shown to reach to the whole of any personal property settled, and to the rents and profits of the realty. But since the case of *Taylor v. Meads* (*y*) it will be consistent that it should be extended to the *corpus* of the realty as well as to that of personalty. It was held in equity, that the general engagements of a married woman could only be enforced against so much of her separate estate as she was entitled to, free from any restraint on anticipation, at the time when the engagements were entered into (*z*), and this was quite consistent with the principle, since equity regarded the liability as arising not strictly *ex contractu*, but by way of charge (*a*) or *quasi* charge; in no case could a personal decree in respect of debts be made against a married woman (*b*). The recent Act, however, has expressly conferred contractual power on married women, and consistently with this change, it has enacted that for

(*u*) *In re Harvey's Estate*; *Godfrey v. Harben*, 13 Ch. D. 216.

(*x*) 45 & 46 Vict. c. 75, s. 4.

(*xx*) 1 Bro. C. C. 16.

(*y*) 4 De G. J. & S. 597.

(*z*) *Pike v. Fitzgibbon*, 17 Ch. D. 454.

(*a*) *Hodgson v. Williamson*, 15 Ch. D. 87.

(*b*) *Francis v. Wigzell*, 1 Madd. 264; *Picard v. Hine*, 5 Ch. 274.

the future, *i.e.*, as to contracts made after the 1st of January, 1883, not only the then present, but also all future accruing separate property is bound (*c*). The effect of the restraint on anticipation is not interfered with, but in the absence of this, all legal or equitable separate property which she may have at the time of the judgment is liable to execution (*d*).

After the death of a *feme covert* having separate estate, creditors may proceed against her separate estate for the payment of their debts, and such estate being equitable assets, the debts will rank *pari passu* (*e*). If she has left a will, her estate will be administered according to the ordinary rules in creditors' suits.

Administra-
tion of mar-
ried woman's
estate.

Restraint on Anticipation.

It is not surprising that the fact of its being held that the separate property of a married woman should be enjoyed by her with as much freedom of disposition, and subject to the same liabilities as if she were a *feme sole*, should have exercised the ingenuity of conveyancers to devise means for preventing such results, and to preserve the settled property at once from voluntary alienation, in which the husband's influence might be exercised prejudicially to the wife's interest, and from liability to destruction through the wife's improvidence. To this end a clause was framed to the effect that the wife should not have power to alienate the property, or to anticipate the enjoyment of the income thereof (*f*). The only question was whether this direction would be sustained in equity. Such a clause would certainly have no effect in a limitation of property to a man or to an unmarried woman (*g*), from whom the *jus disponendi* cannot be taken away by a mere prohibition; but when the matter came before the Courts,

Origin of
restraint on
anticipation.

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| <p>(<i>c</i>) 45 & 46 Vict. c. 75, s. 1;
<i>Turnbull v. Forman</i>, 15 Q. B. D.
234.</p> <p>(<i>d</i>) <i>King v. Lucas</i>, 23 Ch. D.
712; <i>Re Vardon's Trusts</i>, 31 <i>ib.</i> 275.</p> <p>(<i>e</i>) <i>Owens v. Dickenson</i>, Cr. & Ph.</p> | <p>48; 45 & 46 Vict. c. 75, s. 23. See
<i>infra</i>, p. 518.</p> <p>(<i>f</i>) <i>Pybus v. Smith</i>, 3 Bro. C. C.
339.</p> <p>(<i>g</i>) <i>Brandon v. Robinson</i>, 18 Ves.
429.</p> |
|--|--|

the case of a married woman's separate estate was held to be distinguishable, and restraint on anticipation was deemed just and reasonable, inasmuch as it tended to further the object for which separate estate was first created (*h*). The clause is accordingly valid and efficacious in a settlement or a devise to a married woman, whether the property in question be real or personal estate, whether limited in fee or absolutely, or for life only (*i*). Since the passing of the Act of 1882, the right to hold separate property being a legal one in every married woman, the doctrines as to separate estate in equity would have lost their importance to a much greater degree than they have, had it not been that the power of restraining anticipation remains incident to equitable separate estate, and to this only. The Act has, of course, not diminished the desirability of protecting a wife from the influence, as well as from the liabilities, of her husband, and to effect this, separate estate must be equitably vested as above described. Where that is done, the following rules will indicate how anticipation or alienation may be restrained, and what are the effects of such restraint.

How effected.
No particular
form of words
needed.

1. *What words will restrain alienation.*

As in the case of separate use, no particular form of words is necessary to restrain alienation if the intention be clear. In addition to the common forms of expression, which are equivalent, with the addition of more or less conventional verbiage, to the clear words "without power of anticipation," it has been held that effectual restraint is imposed by a direction that a trustee shall during the lady's life receive the income "when and as often as the "same shall become due," and pay it as she shall appoint, or permit her to receive it to her separate use, and that her receipts, or the receipts of any person to whom she

(*h*) *Tullett v. Armstrong*, 1 Beav. 22.

(*i*) *Baggett v. Meux*, 1 Coll. 138; 1 Ph. 627; *Re Sykes' Trusts*, 2 J. & H. 415.

may appoint the same after it shall become due, shall be valid discharges for it (*k*). So, also, if the property is "not to be sold or mortgaged" (*l*), or if it is declared that the wife shall "not sell, charge, mortgage, or encumber it," though this may be followed by a declaration that she should take it to her own sole and separate use and benefit and disposal, and have the sole management thereof (*m*). It is not necessary that negative words should be introduced in the receipt clause; this must be construed to relate to the income, subject to such restraints as are imposed in the words of limitation (*n*).

On the other hand, the following expressions have been considered insufficient to show a clear intention to restrain anticipation: Where there has been a bequest of stock for the separate use of a wife for life, with a direction that it should "remain during her life and be under the orders of the trustees made a duly administered provision for her, and the interest given to her *on her personal appearance and receipt*" (*o*); and where the wife is to receive separate property "with her own hands from time to time," or "so that her receipts alone for what shall be actually paid into her own proper hands shall be good discharges" (*p*). In short, words which amount only to an amplification of the sense embodied in the expression "separate use" will not add to the force of that expression by effecting a restraint on anticipation (*q*). Where, again, it was provided in a gift to a wife for her separate use for life, and after her decease to her appointees, that "in case any appointment should be made by deed, the same should not come into operation until after her death," it was held that there

Expressions
insufficient.

(*k*) *Field v. Evans*, 15 Sim. 375;
Baker v. Bradley, 7 De G. M. & G.
597; *Chapman v. Wood*, 51 L. T. R.
501.

(*l*) *Steedman v. Poole*, 6 Ha. 193.

(*m*) *Baggett v. Meux*, *sup.*

(*n*) *Harrop v. Howard*, 3 Ha. 624.

(*o*) *In re Ross's Trust*, 1 Sim.
N. S. 196.

(*p*) *Parkes v. White*, 11 Ves. 222;
Acton v. White, 1 S. & S. 429.

(*q*) *Pybus v. Smith*, 1 Ves. jr.
189; 3 Bro. C. C. 340.

was no restraint on anticipation, and that she might appoint the fund by an irrevocable deed (*r*).

The question of restraint or no restraint wholly depends on the intention expressed in the instrument by which the property is settled. The fact that the property in question bears income is of weight in determining what the intention is, but this is not the essential point of inquiry (*s*).

Must conform
to rule against
perpetuities.

It must be carefully observed that a clause restraining anticipation will be invalid if its effect would be to transgress the rule as to perpetuities (*t*).

It was also held that in a bequest to persons in *esse* for life with remainder to their unborn children, with a general direction that the females should take for their separate and inalienable use, the restriction was void on the ground of its remoteness (*u*).

2. *The effects of restraint upon anticipation.*

Restraint
renewed on
second
marriage.

It has already been observed that property in the hands of a *feme sole* cannot be made inalienable. The question, therefore, has arisen whether, when on the death of the husband of a married woman so restrained the restraint was discharged, it attached again on the occasion of a second marriage. This was decided in the affirmative in *Tullett v. Armstrong* (*x*). From that case the state of the law may be deduced as follows: If the gift be made for her sole and separate use, without more, she has, during the coverture, an alienable estate, independent of her husband. If, in addition to the limitation to her separate use, there is a restraint on anticipation, she has during the coverture the present enjoyment of an inalienable estate independent of her husband. In either case, she has when

Tullett v.
Armstrong.

(*r*) *Alexander v. Young*, 6 Ha. 393.

(*s*) *Re Bown, O'Halloran v. King*, 27 Ch. D. 411; see *Re Ellis' Tr.*, 17 Eq. 409; *Re Croughton's Tr.*, 8 Ch. D. 460; *Acason v. Greenwood*, 34 *ib.* 85, 712; *Re Tippet's and Newbould's Contr.*, 37 *ib.* 444.

(*t*) *Fry v. Capper*, Kay, 163; *In re Teague's Settlement*, 10 Eq. 564; which were reluctantly followed in *In re Ridley*, 11 Ch. D. 645; *Cooper v. Laroche*, 16 Ch. D. 368.

(*u*) *Armitage v. Coates*, 35 Beav. 1.

(*x*) 1 Beav. 1.

discover a power of alienation, since the restraint on anticipation is incident only to separate estate, and there can be no such thing as separate estate apart from coverture. But the restriction being a modification of the separate estate is inseparable from it, and it accordingly again comes into operation when, on a second coverture, the property again becomes separate estate (*y*).

This being the case, the question often arises, in cases where the woman has while discovert aliened the property, and replaced it by other property, or otherwise dealt with it so as to alter its condition, whether such acts do not effectually discharge the property from all conditions, so that she in future holds it, whether sole or covert, discharged from all trust or restraint. The answer to this inquiry depends on circumstances. Substitution of other property.

If the property remains during the time of the discoverture, and until a second coverture, in the hands of trustees *in statu quo*, no question arises. If even there be no trustees, and the property has not in the interim been dealt with, upon her subsequent marriage the separate use and the restriction attached revive (*z*). If, on the other hand, property vested in trustees has been sold during the discoverture at the woman's request, and the proceeds handed to her, the identity of the settled estate or fund is clearly gone, and accordingly the separate use, with all its incidents, completely ceases (*a*). Or if even the property is converted by means other than sale into property of a different kind, the trust ceases, and with it all the conditions thereof (*b*). The test question as to the continuance of the separate use and restraint on anticipation is whether the property can be identified, or whether it has lost its individuality in the meanwhile by the woman's dealing with it. When substituted property under restraint, and when not.

(*y*) See also *Woodmeston v. Walker*, 2 R. & My. 197; *Hawkes v. Hubback*, 11 Eq. 5.

(*z*) *Newlands v. Paynter*, 4 My. &

Cr. 408.

(*a*) *Wright v. W.*, 2 J. & H. 655.

(*b*) *Ibid.* *Buttanshaw v. Martin*, Johns. 89.

Separate use,
&c., may be
confined to
one coverture.

It is, of course, quite possible to confine the trust for the separate use of a married woman to a particular coverture (c), but this will not be presumed when the words employed indicate an intention that it should continue during her life (d).

General
effects of
restraint.

A clause restraining anticipation will effectually prevent a married woman from alienating or charging any part of the *corpus* of the settled estate or fund during the coverture. She can only deal with the interest after it has become payable, not having power even to assign an apportioned part of unpaid interest up to the date of the assignment (e).

The clause is equally efficacious to prevent an involuntary alienation by operation of law of the *corpus* or the future income of a fund, during the coverture. Thus not even for her fraud is such property chargeable (f). *A fortiori* it will not be liable for her debts or general engagements incurred during coverture (g). The only charges which can affect a fund so restricted are debts contracted before marriage (h), and the costs properly incurred by the trustees in the administration of the trust (i).

Restraint
could not
until recently
be dispensed
with even by
the Court.

So strictly was the restraint on anticipation regarded, that it could not, until recently, be dispensed with by a Court of equity, even where it was manifestly for the benefit of the married woman to do so, as where she was put to her election between her settled property and a bequest of much greater value (k). But now, by 44 & 45 Vict. c. 41, s. 39, the Court is empowered, with her consent,

(c) *Moore v. Morris*, 4 Drew. 33.

(d) *Gaffee's Sett.*, 1 Mac. & G. 541;
Hawkes v. Hubback, 11 Eq. 5.

(e) *In re Brette*, 2 De G. J. & S. 79.

(f) *Clive v. Carew*, 1 J. & H. 199; *Arnold v. Woodhams*, 16 Eq. 29.

(g) *Fitzgibbon v. Blake*, 3 Ir. Ch. Rep. 528; *Pike v. Fitzgibbon*, 17

Ch. D. 454; *Re Pellew*, 14 Q. B. D. 973.

(h) *Sanger v. S.*, 11 Eq. 470;
London and Prov. Bank v. Bogle, 7 Ch. D. 773.

(i) *D'Oechsner v. Scott*, 24 Beav. 239; *In re Keane*, 12 Eq. 115.

(k) *Robinson v. Wheelwright*, 21 Beav. 214; 6 De G. M. & G. 535;
Gaskell's Trusts, 11 Jur. N. S. 780.

to bind her interest, where it appears to be for her benefit, notwithstanding the restraint. Under this power the Court has released the restraint so as to provide for the payment of pressing creditors (*l*); but the Court has no general power to dispense with the restraint on the mere request of a married woman (*m*). By the Settled Land Act of 1882, it is provided that a married woman may exercise her powers under the Act notwithstanding a restraint on anticipation (*n*).

It appears that the clause restraining anticipation does not exempt a married woman from the consequences of lapse of time and acquiescence (*o*), nor prevent her from binding herself by a compromise with her trustees (*p*). Acquiescence and compromise.

Pin-money.

Analogous to separate estate, but in some respects requiring separate consideration, is what is termed the pin-money of the wife. It has, indeed, been said to be impossible precisely to express the distinction between pin-money and separate estate (*q*). Pin-money.

Pin-money may, however, be sufficiently described as an allowance settled upon a wife before marriage for the purpose of her separate personal expenditure. It is designed to defray her personal expenses, and to purchase dress and ornaments suitable to her husband's rank, so that it shall not be necessary for these purposes that she should be continually applying to her husband for money. Gifts and payments of money made for the same purposes by the husband during the coverture, are also considered as pin-money. Definition.

Almost the only questions respecting pin-money which come under judicial notice are those connected with claims for payment of arrears after a husband's death. The rules

(*l*) *Hodges v. H.*, 20 Ch. D. 749;
Re Little's Will, 36 *ib.* 701.

(*m*) *Re Warren's Settlement*, 52
L. J. Ch. 928.

(*n*) 45 & 46 Vict. c. 38, s. 61,
sub-s. 6.

(*o*) *Derbshire v. Home*, 3 De G.
M. & G. 80.

(*p*) *Wilton v. Hill*, 25 L. J. Ch.
156.

(*q*) *Howard v. Digby*, 8 Bli. N. R.
259.

respecting such claims sufficiently distinguish pin-money from ordinary separate estate.

Arrears, how far recoverable.

No right to accumulate.

As a rule, when a wife permits her pin-money to run considerably in arrear, she cannot on the death of her husband claim payment for more than one year prior to his death (*r*). The income of her separate estate she may save or spend as she pleases; but the purpose for which pin-money is provided is for expenditure as may be necessary; and if not required, if, for instance, the husband chooses to defray the expenses which would fairly come within it, the wife has no right to accumulate it. If, indeed, the husband has actually paid for all the wife's apparel, and provided for all her private expenses, it has been held that her pin-money is thereby satisfied, and that she cannot claim any arrears at all at his death (*s*). Again, pin-money being required only for the wife personally, her executors have no right to claim any arrears (*s*).

The only case in which more than one year's arrears has been allowed was where it appeared that the wife had complained of short payments of the money, and her husband had promised that she should have it at last. There she was held entitled to all the arrears due at her husband's death (*u*).

Paraphernalia.

Paraphernalia defined.

Such apparel and ornaments of a wife as are suitable to her condition in life, such as jewels, &c., given to her to be worn on her person, are called her paraphernalia (*x*). The family jewels of the husband, though worn by the wife, are not included, unless she acquires them as such by gift or bequest (*y*). As to gifts of jewels by a husband to his wife after marriage, it apparently depends on the

(*r*) *Aston v. A.*, 1 Ves. sr. 267;

Townshend v. Windham, 2 Ves. sr. 7.

(*s*) *Thomas v. Bennett*, 2 P. Wms. 341; *Howard v. Digby*, 8 Bli. N. R. 269.

(*u*) *Rideout v. Lewis*, 1 Atk. 269.

(*x*) *Graham v. Londonderry*, 3 Atk. 394.

(*y*) *Jerroise v. J.*, 17 Beav. 570.

intention whether they shall be deemed paraphernalia or separate estate. If given only for the express purpose of her wearing them, they are paraphernalia (*z*); if given to her absolutely, they become separate property (*a*). Such articles given by a person other than the husband are usually deemed to constitute separate property (*b*).

During the life of the husband and wife, the husband may dispose of the wife's paraphernalia either by sale or gift *inter vivos*; but he cannot dispose of them by will (*c*). If, however, he purports to do so, and by the same will confers other benefits upon his wife, she will be put to her election between her paraphernalia and such benefits (*d*). The wife has no power to dispose of her paraphernalia, either by gift or will, during the husband's lifetime (*e*).

Husband's power over paraphernalia.

The paraphernalia are liable to the debts of the husband (*f*), but in the administration of the assets of a deceased husband, his widow's claim to paraphernalia is preferred to the general legacies (*g*). She is, therefore, entitled to marshal the assets in her favour in all cases in which a general legatee can do so (*h*). Where, moreover, the husband in his lifetime has not alienated but has merely pledged his wife's paraphernalia, on his death she is entitled to have them redeemed, if the estate be sufficient, even to the prejudice of his legatees; her claim being higher than that of pure volunteers (*i*).

Liability to husband's debts.

(*z*) *Ibid.*

(*a*) *Graham v. Londonderry, sup.*; *Grant v. G.*, 13 W. R. 1057; *Williams v. Mercier*, 10 App. C. 1; 9 Q. B. D. 337.

(*b*) *Lucas v. L.*, 1 Atk. 270.

(*c*) *Seymore v. Tresilian*, 3 Atk. 358.

(*d*) *Churchill v. Small*, 2 Kenyon, pt. 2, p. 6.

(*e*) 1 Bright. H. & W. 287.

(*f*) *Campion v. Cotton*, 17 Ves. 273.

(*g*) *Tipping v. T.*, 1 P. Wms. 729.

(*h*) See *infra*, p. 543.

(*i*) *Graham v. Londonderry, sup.*

II. *The Equity to a Settlement.*

The second of the great principles by which equity modified the doctrines of common law respecting the status of married women, is that known as the wife's equity to a settlement.

How far obsolete.

It has already been stated that, owing to the provisions of the Act of 1882, this doctrine has all but become obsolete. That this is so is apparent from ss. 2 and 5 of the said statute. By the former section it is enacted that every woman who marries after the commencement of this Act (1 January, 1883), shall be entitled to hold as her separate property and to dispose of all real and personal property which shall belong to her at the time of the marriage, or shall be acquired by or devolve upon her after marriage. It follows that as to all women married after the date named the doctrine in question has no application, since as to them, no longer will the husband take any interest in his wife's property, whether belonging to her at the date of the marriage or accruing afterwards.

Further, by s. 5 it is enacted that every woman married before the commencement of the Act shall be entitled to hold and dispose of as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of the Act. Thus, the Act has no retrospective effect so as to interfere with the marital rights of a husband already accrued; but, in this respect, differing from the Act of 1870, it does not save the rights of husbands already married respecting property henceforth accruing to the wife. The result is that for the future the only application of the doctrine of an equity to a settlement is to reversionary interests already *vested* in women married before the 1st of

January, 1883, but which fall into possession after that date (*k*).

Under these circumstances a brief exposition will suffice of a principle which, in the course of a few years, will have ceased to have anything more than an historical interest.

Originating in the familiar maxim that "*he who seeks equity must do equity*," the doctrine by which Courts of equity decreed, as against a husband, a settlement of such property as he received in his wife's right was at first only applied in cases in which it was necessary for the husband to seek the assistance of the Court in order to obtain possession of the wife's property.

Settlement as against husband when plaintiff.

But the jurisdiction which was thus first exercised only when the husband came before the Court as a plaintiff, did not long remain so confined. The next step in its development was its application against the assignees of a bankrupt or insolvent husband, or under a general assignment for the payment of his debts; these being held entitled to relief only on the same terms on which it would have been granted to the husband himself (*l*).

Against assignees of insolvent husband.

Then, on the ground that it was absurd to allow a husband by an assignment for valuable consideration to put the assignee in a better position than himself, and thus indirectly to defeat the equity of the wife, the Court maintained the same doctrine in suits by purchasers (*m*) and mortgagees (*n*).

Against purchaser.

Lastly, we come to the full development of the principle in the leading case of *Elibank v. Montolieu* (*o*), in which a wife was permitted to assert her right in equity as a plaintiff without the necessity of waiting until her husband might need the aid of the Court.

Settlement at the suit of the wife.

(*k*) *Reid v. R.*, 31 Ch. D. 401; overruling *Baynton v. Collins*, 27 Ch. D. 604; and *Re Thompson and Curzon*, 29 *ib.* 177.

(*l*) *Oswell v. Probert*, 2 Ves. jr. 680; *Jewson v. Moulson*, 2 Atk. 417, 420.

(*m*) *Macaulay v. Philips*, 4 Ves. 15, 19.

(*n*) *Scott v. Spashet*, 3 Mac. & G. 599.

(*o*) 5 Ves. 737; and see *Robinson v. R.*, 12 Ch. D. 188.

1. *The nature of the right.*

Equity to a
settlement
includes
children.

The right to assert or to waive the equity to a settlement rests solely with the married woman, but this notwithstanding, the right may not as a rule be insisted upon by her for her exclusive benefit. When, from the nature of the estate or fund in question, provision can at the same time be made for her children, this is invariably done. Her equity and the equity of the children are treated as one equity, and if asserted, it must be asserted for their common benefit (*p*).

She may
waive it.

The consequence of the right being personal to her is, that if she dies without having taken any steps to claim it, the children cannot set up a claim (*q*). And further, the wife may, at any time before the settlement is completed, waive her right to it, and thus defeat the interest of her children (*r*). But if, as in the case of *Murray v. Elibank* (*s*), a decree of reference has been made to approve a proper settlement, and then the wife dies without having waived it, the children are then entitled to the benefit of the decree, even though they may not have been mentioned therein (*t*).

Children's
right attaches
on decree,

The making of the decree marks the exact point at which the right of the children attaches. The fact that proceedings have been commenced by the wife to secure a settlement is not sufficient (*u*). Still less would notice given by her to trustees in whom the fund was vested avail (*x*). But the right of the children will attach when the wife has entered into a contract with her husband or with her husband's assignees for a settlement of her property (*y*).

or on contract
for settle-
ment.

(*p*) *Johnson v. J.*, 1 J. & W. 472, 479.

(*q*) *Scriven v. Tapley*, 2 Eden, 337.

(*r*) *Hodgens v. H.*, 11 Bli. N. S. 104; *Lloyd v. Williams*, 1 Madd. 450, 467.

(*s*) 10 Ves. 84; 13 *ib.* 1.

(*t*) *Rowe v. Jackson*, Dick. 604;

Groves v. Perkins, 6 Sim. 584; 1 Kee. 132.

(*u*) *De la Garde v. Lemprière*, 6 Beav. 344; *Lloyd v. Mason*, 5 Ha. 149.

(*x*) *Hallace v. Auldjo*, 2 Dr. & S. 216, 222.

(*y*) *Lloyd v. Williams*, *sup.*

Where, therefore, such a decree has been made or contract entered into, the children have a vested right to a provision, which is, however, liable to be divested by a waiver of the right by the wife (*z*); but her death without waiver will not prejudice it. This position continues until the execution of the settlement decreed or agreed upon; from which time the right of the children becomes indefeasible, the wife having no longer the power to waive it (*a*).

Having already seen that a married woman's equity to a settlement may now be generally asserted by her as against her husband and his assignees, whether in bankruptcy or for valuable consideration, the next consideration is as to what property is affected by her right.

2. *Out of what property a settlement can be claimed.*

In the consideration of the different species of property affected by a wife's equity to a settlement, we shall be assisted by first observing two general principles respecting the doctrine.

(1.) The equity to a settlement does not attach on what a wife takes in her own right, but upon what the husband takes in right of the wife. Thus, if property descends upon a married woman as tenant in tail, whatever her right to a provision out of the income, which her husband would at law be entitled to receive, she would have no equity to a settlement out of the *corpus*, to which the law gave him no claim in right of his wife (*b*).

The equity only attaches to what husband takes in wife's right.

(2.) The equity to a settlement attaches not on the property itself, but on the right to receive it; that is to say, it only arises on the husband's legal right to present possession. Thus, a wife cannot claim a settlement out of a reversionary interest in property as long as it continues reversionary (*c*).

It only attaches on the right to receive the property.

(*z*) *Fenner v. Taylor*, 2 Russ. & M. 190.

(*a*) *Barker v. Lea*, 6 Madd. 330.

(*b*) *Life Assoc. of Scotland v. Sid-*

dal, 3 De G. F. & J. 271; *Re Cum-*
ming, 2 *ib.* 376.

(*c*) *Osborn v. Morgan*, 9 Ha. 434.

Bearing in mind these general principles, we shall the more easily follow the classification of those species of property subject to the obligation of a settlement.

Generally only equitable estates considered,

though legal property, if subject to suit, is liable.

Equitable choses in action and estates fee or tail.

From the nature of the case it is evident that we have as a rule only to deal with equitable estates and interests. Such property as the husband could recover at law without the assistance of a Court of equity is unaffected by a doctrine which took its rise merely in the form of a condition imposed by equity on the granting of its assistance (*d*). And though by the Judicature Act (*e*) equitable estates and interests are now recognisable in Courts of law, this makes no difference, inasmuch as, by the same authority, the wife's equity would likewise be enforceable there. If, however, the property, though in its nature legal, becomes from collateral circumstances the subject of a suit in equity, it was held in the important case of *Sturgis v. Champneys* (*f*) that the wife's equity attached; Lord Cottenham considering that whatever cause brought the parties before the Court brought them within the operation of the maxim, "*That he who seeks equity must do equity*" (*g*). Thus, also, where a married woman was legal tenant in tail in possession of an estate which was subject to an equitable term of years to secure a jointure, the existence of the term was considered sufficient to entitle the wife to claim a settlement, the title to the rents being equitable as long as the term lasted (*h*).

The equity to a settlement, then, clearly attaches upon equitable choses in action to which the husband becomes entitled in the right of his wife (*i*). Though in some circumstances a settlement for life may be made out of an

(*d*) But see *Ruffles v. Alston*, 19 Eq. 539, 546.

(*e*) 36 & 37 Vict. c. 66.

(*f*) 5 My. & Cr. 97; and see *Gleaves v. Paine*, 1 De G. J. & S. 87.

(*g*) See also *Oswell v. Probert*, 2

Ves. jr. 680.

(*h*) *Wortham v. Pemberton*, 1 De G. & Sm. 644.

(*i*) *Burdon v. Dean*, 2 Ves. jr. 607; *Smith v. Matthews*, 3 De G. F. & J. 139.

equitable estate of inheritance, equity will not interfere with the possible estate by curtesy of the husband (*k*). The fact, moreover, of a legacy being charged upon land, with a power of entry and receipt of the rents and profits, does not so deprive it of its equitable character as to interfere with the wife's right (*l*).

Where a husband in the right of his wife becomes entitled to a legal interest in leaseholds, the wife cannot claim a settlement thereout, and the husband can effectually dispose of them by sale or mortgage (*m*). But if the legal estate of leaseholds is in a trustee for the wife, it is now clearly decided that any disposition the husband may make is subject to his wife's equity (*n*).

Leaseholds
legal,

equitable.

Where the interest of the married woman is for life only, it depends on circumstances whether she can claim a settlement thereout. It is clear that if the husband has deserted his wife, or if he fails through insolvency to provide for her, equity will settle the fund on her as against her husband, and also as against anyone claiming under him by virtue of an assignment for value made subsequently to the bankruptcy (*o*); therefore, *à fortiori*, as against his trustee in bankruptcy (*p*).

Life interests
when subject
to settlement.

It is also clear that if the husband is living with and maintaining his wife, she cannot claim a settlement out of a life interest against a particular assignee for value of her husband (*q*); and if such an assignment has been made, it cannot afterwards be disturbed by any subsequent misconduct of the husband in not maintaining her (*r*). And further, the right cannot under the same circumstances be

(*k*) *Smith v. Matthews*, *sup.*

(*l*) *Duncombe v. Greenacre*, 28 Beav. 472; 2 De G. F. & J. 509.

(*m*) *Hatchell v. Egglese*, 1 Ir. Ch. 215; *Hill v. Edmonds*, 5 De G. & S. 603.

(*n*) *Hanson v. Keating*, 4 Ha. 1.

(*o*) *Sturgis v. Champneys*, 5 My. & Cr. 97; *Wright v. Morley*, 11

Ves. 12; *Elliott v. Cordell*, 5 Mad. 149.

(*p*) *Lumb v. Milnes*, 5 Ves. 517; *Taunton v. Morris*, 8 Ch. D. 453; 11 *ib.* 779.

(*q*) *Tidd v. Lister*, 3 De G. M. & G. 857, 869.

(*r*) *Ibid.* 870; *Re Carr's Tr.*, 12 Eq. 609.

asserted as against the husband himself. From the nature of the case the children could not participate in the settlement, and, as between husband and wife, as long as he performs his duty, he is entitled to his legal rights (*u*).

Arrears of income.

It is clear, moreover, that a wife is not entitled to any settlement out of arrears of income accruing due before she has set up any claim thereto. Such income will be paid to her husband or his assignees (*x*).

3. *Waiver of settlement.*

When there cannot be waiver.

Infant.

Ward of Court.

We have seen that, as a general rule, it is within the option of a married woman to bar her own equity and that of her children by waiving her right to a settlement. But it is not in all cases and at all times open to a married woman to waive her right. Thus, she cannot do so during infancy (*y*). A female ward of Court married without its authority cannot consent (*z*), except, perhaps, where the marriage has been with the consent of her guardian (*a*). When, moreover, a ward of Court is domiciled in a country where the principle of an equity to a settlement is not recognised, the Court will not part with her funds unless satisfied that a proper provision has been made for her (*b*).

Fund must be ascertained.

Further, consent will not be taken until the amount of the fund in question is ascertained (*c*); nor will it be binding if it has been made under the influence of mistake (*d*).

Consent to waive may be retracted.

Notwithstanding that consent has been given, it may be retracted at any time before the payment to the husband

(*u*) *Vaughan v. Buck*, 13 Sim. 404.

(*x*) *Newman v. Wilson*, 31 Beav. 34; *In re Carr's Tr.*, 12 Eq. 609.

(*y*) *Stubbs v. Sargon*, 2 Beav. 496; *Shipway v. Ball*, 16 Ch. D. 376.

(*z*) *Stackpoole v. Beaumont*, 3 Ves. 89.

(*a*) *Bennett v. Biddles*, 10 Jur. 534.

(*b*) *In re Tweedale's Settlement*, Johns. 109.

(*c*) *Edmunds v. Townshend*, 1 Anst. 93.

(*d*) *Watson v. Marshall*, 17 Beav. 363.

is made, or the transfer completed (*e*); and, apart from that, the Court has power to postpone in its discretion the payment or transfer (*f*).

4. *What circumstances will bar the equity to a settlement.*

Not merely may a married woman deprive herself of her equity to a settlement by a voluntary waiver, but there are many circumstances, apart from such consent, which will effectually prevent her assertion of the right. Thus,—

(1.) Where the property, whether *corpus* or income, has once come to the hands of the husband or his assignee, the wife can no longer claim her equity. And no transfer or payment so made by a trustee before action brought can be afterwards disturbed (*g*). Reduction into possession.

(2.) When a woman, at the time of her marriage, owes more than the whole amount of her property, she has no equity to a settlement out of it (*h*). But the mere fact of her having been indebted at that time would not prevent her claiming a settlement out of so much of the fund as remained after making provision for the payment of the debts (*i*). Her equity is also lost when her husband is indebted to the estate to an amount exceeding the wife's interest (*k*). Wife insolvent.

(3.) If an adequate settlement has already been made upon her, the wife's equity to a settlement is thereby barred for the future (*l*). It may also be barred by an express stipulation to that effect made before marriage, even though the settlement were inadequate (*m*). If the original settlement is adequate, it is not essential that it should have been made by the husband (*n*). Adequate settlement already made.

(4.) The equity to a settlement may be lost by the Alienation by the wife.

(*e*) *Penfold v. Mould*, 4 Eq. 562.

(*k*) *Knight v. K.*, 18 Eq. 487.

(*f*) *Wright v. Rutter*, 2 Ves. 673, 677.

(*l*) *In re Erskine's Tr.*, 1 K. & J. 302.

(*g*) *Milner v. Colmer*, 2 P. Wms. 639, 641; *Allday v. Fletcher*, 1 De G. & J. 82.

(*m*) *Salway v. S.*, Amb. 692; *Garforth v. Bradley*, 2 Ves. sr. 675.

(*h*) *Bonner v. B.*, 17 Beav. 86.

(*n*) *Giacometti v. Proddgers*, 8 Ch. 338.

(*i*) *Barnard v. Ford*, 4 Ch. 247.

alienation by the wife of the property concerned. It is necessary, therefore, here to consider by what means such alienation may be effected. But it must be carefully observed that the following matter under this head applies only to the very limited number of cases in which the interest in question vested, prior to 1st January, 1883, in a woman married prior to that date. In all other cases, a married woman has, by virtue of the Act of 1882 (*o*), the same power of disposition as a *feme sole*.

As to realty.
3 & 4 Will.
IV. c. 74;
8 & 9 Vict.
c. 106.

(i.) As to realty. By virtue of the Fines and Recoveries Act (*p*), and the Real Property Amendment Act (*q*), a married woman might dispose of her estates of freehold, and also release or assign any sum of money charged on lands, or the produce of land directed to be sold, whether her interest be in possession or reversion, by a deed duly acknowledged by her, after separate examination before a judge or a commissioner, and made with the concurrence of her husband (*r*).

She might also dispose of her copyholds by surrender, jointly with her husband, on being separately examined by the steward or his deputy.

(ii.) As to personalty.

Personalty.

A married woman's personal estate, as we have seen, vests in her husband on the marriage. During the marriage, therefore, she has no power of disposition over it, except in case of property or powers falling within 20 & 21 Vict. c. 57, presently mentioned. If her husband reduces her choses in action into possession they become his. If not, and his wife survives him, she will be entitled to them.

20 & 21 Vict.
c. 57.

By 20 & 21 Vict. c. 57 (commonly known as *Malins' Act*), it was enacted that, after the 31st of December, 1857, it should be lawful for a married woman to release or extinguish any power which might be vested in or limited to

(*o*) 45 & 46 Vict. c. 75, s. 1.
(*p*) 3 & 4 Will. IV. c. 74.

(*q*) 8 & 9 Vict. c. 106.
(*r*) 45 & 46 Vict. c. 39, s. 7.

or reserved to her in regard to any personal estate, as fully and effectually as she could do if she were a *feme sole*, and also to release or extinguish her right or equity to a settlement out of any personal estate to which she, or her husband in her right, may be entitled in possession, under any instrument made after the 31st of December, 1857 (s). Her husband must, however, concur in the deed effecting this purpose, and the deed must be acknowledged in the manner prescribed by the Fines and Recoveries Act, varied by the Conveyancing Act, 1882, as above quoted.

(5.) A married woman's equity to a settlement may be barred by her fraud; for instance, by her concealing the fact of her marriage from a purchaser (t). Fraud.

(6.) If a wife is living in adultery apart from her husband, her right is generally barred (u); but if the husband also is living in adultery, it is not so (x); nor if, being a ward of Court, she marries without its consent (y). Adultery.

Moreover, it seems that, even in the absence of such circumstances, the husband will not be allowed to receive the whole of the property of a wife who is living in adultery, if he does not maintain her (z).

5. *Amount of the settlement.*

Where a wife has established her equity to a settlement, and the amount to be settled is not agreed upon between the husband and wife, the Court, in determining this, is guided by a consideration of the circumstances of the whole case (a). We shall consider separately the settlement of income and the settlement of *corpus*.

(1.) *As to income.*

As a general rule, where the husband is solvent and has been guilty of no misconduct, the Court will not interfere Husband usually takes income.

(s) s. 1.

(t) *In re Lush's Tr.*, 4 Ch. 591.

(u) *Carr v. Eastabrook*, 4 Ves. 146.

(x) *Greedy v. Lavender*, 13 Beav.

62.

(y) *Ball v. Coutts*, 1 V. & B. 292, 302, 304.

(z) *Ball v. Montgomery*, 2 Ves. jr. 191.

(a) *Carter v. Taggart*, 1 De G. M. & G. 289.

with his legal right, but will allow him to receive the whole income of the property. It is satisfied with retaining the capital, so as to give the wife a chance of taking it by survivorship (*b*).

Secus if he
deserts her.

But if the husband deserts his wife and leaves her unprovided for, she is entitled to the payment of the income of her property to herself (*c*).

We have already seen that with respect to a life interest, a wife is entitled, in the case of desertion by, or the bankruptcy of, the husband, to a settlement on herself as against the husband, or his trustee in bankruptcy, or against an assignee for value, if the assignment has been made subsequent to the desertion. And it has been decided that such settlement may extend to the whole of the income (*d*). As long as the husband supports her, she cannot claim a settlement as against him, or against his assignee for value (*e*). Even in the case of a husband's insolvency, a settlement of income was refused where the wife had already an adequate provision for her separate use (*f*).

(2.) *As to capital.*

One half of
capital the
rule,

The general rule, in the absence of special circumstances, is that one half of the wife's property shall be settled upon her, and the other half go to the husband or his assignees (*g*).

but subject to
discretion.

This is, however, quite a matter for the discretion of the Court, which will take into consideration the amount of the wife's fortune already received by the husband; any previous settlement which may have been made (*h*); whether the wife has received any benefit out of the husband's

(*b*) *Sleech v. Thorington*, 2 Ves. sr. 561; *Atcheson v. A.*, 11 Beav. 485.

(*c*) *Gilchrist v. Cator*, 1 De G. & Sm. 188; *Dunkley v. D.*, 4 De G. & S. 570; 2 De G. M. & G. 390.

(*d*) *Taunton v. Morris*, 11 Ch. D. 779; *Fowke v. Draycott*, 29 Ch. D.

996.

(*e*) *Supra*, p. 389.

(*f*) *Aguilar v. A.*, 5 Madd. 414.

(*g*) *Jewson v. Moulson*, 2 Atk. 417, 423; *Spirett v. Willows*, 1 Ch. 520; 4 Ch. 407.

(*h*) *Green v. Otte*, 1 S. & S. 250; *Napier v. N.*, 1 D. & W. 407.

property (*i*); the conduct and circumstances of the husband (*k*), and the conduct of the wife (*l*).

Circumstances may appear under these considerations which will induce the Court to go so far as to settle the whole fund on the wife. Where the husband has already received a considerable fortune from her (*m*), where he has become insolvent and no settlement has been made (*n*), and where he has deserted or behaved cruelly to his wife (*o*), the whole fund has been settled; and the same was done where, in the absence of such circumstances, the fund was small and barely sufficient for a provision for the wife and children (*p*).

6. *Form of the settlement.*

The design of the settlement being to provide for the wife and children, the Court will, as far as possible, accomplish this, but will not interfere with the marital legal right farther than is necessary for this purpose. The usual limitations will be, therefore, as to personalty, to give the income either to the husband, or his assignee, or to the wife for life for her separate use without power of anticipation, according to the circumstances above discussed, and the *corpus* to her children after her death (*q*); if there should be no issue the ultimate remainder will, it seems, be to the husband absolutely, whether he survives the wife or not (*r*). The fact of the husband's insolvency, or his having assigned his interest, or of the wife's relations being in humble circumstances, is not sufficient reason for deviating from this rule in favour of the wife, or her next of kin (*s*).

(*i*) *In re Erskine's Tr.*, 1 K. & J. 302.

(*k*) *Coster v. C.*, 9 Sim. 597.

(*l*) *Giacometti v. Prodgers*, 14 Eq. 253; 8 Ch. 338.

(*m*) *Gardner v. Marshall*, 14 Sim. 575.

(*n*) *Francis v. Brooking*, 19 Beav. 347.

(*o*) *Dunkley v. D.*, *sup.*; *Bozall*

v. B., 27 Ch. D. 220.

(*p*) *In re Kincaid's Tr.*, 1 Drew. 326; 17 Jur. 106.

(*q*) *Gent v. Harris*, 10 Ha. 383.

(*r*) *Carter v. Taggart*, 1 De G. M. & G. 286; *Croxtan v. May*, 9 Eq. 404; *Walsh v. Wason*, 8 Ch. 482; *Spirett v. Willows*, *sup.*

(*s*) *Carter v. Taggart*, *sup.*

Settlement
deemed on
good con-
sideration.

7. *How far the settlement binds creditors.*

Where the Court decrees a settlement upon a wife, it will be supported as a good settlement for valuable consideration (*t*).

Further, if after marriage property accrues to the husband in right of the wife, which the husband cannot reach without the aid of the Court, and by agreement he consents to such a settlement as the Court would have ordered, this settlement will be maintained against creditors (*u*).

Even if trustees in possession of the property of a married woman should, on the mere request of her husband transfer it to new trustees upon trust for her separate use, such trust will be good as against his creditors (*x*).

But if the husband has once reduced into possession the equitable choses in action of his wife, any subsequent settlement of them must conform to 13 Eliz. c. 5, or it will be void as against creditors (*y*).

Reduction into possession of wife's property by husband.

Having seen that a husband's right to his wife's choses in action depends upon his reducing them into possession, we are led by this case to inquire what acts amount to a reduction into possession.

Payment to
husband.

1. The clearest case is of course where the husband actually receives payment of the sum in question—for instance, a sum due to her on a mortgage (*z*). If, however, he so receives money in the character of trustee, this will not amount to a reduction into possession (*a*).

Transfer into
his name.

2. The transfer of a wife's stock into her husband's sole name, or even a transfer by his direction into the names of trustees, upon trusts inconsistent with his wife's equity, amounts to a reduction into possession (*b*). But if such

(*t*) *Wheeler v. Caryl*, Amb. 121; *Simson v. Jones*, 2 R. & M. 365.

(*u*) *Wheeler v. Caryl*, *sup.*; *In re Wray's Tr.*, 16 Jur. 1126.

(*x*) *Ryland v. Smith*, 1 My. & Cr. 53.

(*y*) *Ibid.*; *Goldsmith v. Russell*, 5 De G. M. & G. 547.

(*z*) *Rees v. Keith*, 11 Sim. 388.

(*a*) *Baker v. Hull*, 12 Ves. 497; *Wall v. Tomlinson*, 16 Ves. 413.

(*b*) *Hansen v. Miller*, 14 Sim. 22.

transfer, or the investment of stock belonging to the wife, be effected in a manner consistent with her equities, the case will be otherwise, and her right by survivorship will remain (c).

3. If a husband and wife together sue to recover choses in action which belonged to the wife before marriage, judgment in the action amounts to reduction into possession by the husband (d); though if he dies after judgment, but before execution, the judgment will survive to the wife (e). But if the husband sues in his own name for a chose in action accruing to his wife during the marriage, and dies after judgment, his representatives, and not the wife, will be entitled (f). Suit by husband and wife.

4. Where the income of a married woman's life estate had been ordered to be received and applied by a receiver in a suit in payment of her husband's incumbrances, it was held that arrears of income in the receiver's hands which had not been paid as directed were, by the effect of the order, reduced into possession (g). Receiver.

5. A sale by a husband of his wife's choses in action, followed by the purchaser's taking possession, will amount to a reduction into possession (h). Sale by husband.

The general result is that any act which has the effect of changing the property in the choses in action will amount to a reduction thereof into possession (i). But acts which do not amount to this will not suffice. Thus, there has been held to be no reduction into possession where there was a fund set apart for payment to the husband (k); where interest only had been paid to the husband (l); where the husband proved against the estate of a bankrupt indebted to his wife, but died before the General principle.

(c) *Ryland v. Smith*, *sup.*

(d) *Sherrington v. Yates*, 12 M. & W. 855.

(e) *Bond v. Simmons*, 3 Atk. 21.

(f) *Oglander v. Baston*, 1 Vern. 396.

(g) *Tidd v. Lister*, 2 W. R. 184; 3 De G. M. & G. 857.

(h) *Widgery v. Tepper*, 5 Ch. D. 516.

(i) *Aitcheson v. Dixon*, 10 Eq. 589.

(k) *Blunt v. Bestland*, 5 Ves. 515.

(l) *Ibid.*; *Howman v. Corie*, 2 Vern. 190.

declaration of a dividend (*m*). On the same principle, payment of a part of a fund only amounts to reduction into possession *pro tanto* (*n*). As to a reversionary interest, an assignment, whether particular or general, could not suffice to bar the wife's right by survivorship (*o*).

If a husband fail actually to reduce his wife's choses in action into possession during her lifetime, he will, upon her death before him, be entitled to them as her administrator, provided that he has not already made an assignment of them, which, though ineffective against her if she survived him, would be valid as against himself. If he dies without taking out letters of administration, his personal representative may become entitled by doing so (*p*).

Assignment
by husband.

The rule is now well established that a husband by assigning his wife's choses in action can give no better right to another than he has himself. If the wife survives the husband, the assignee of a reversionary interest can take nothing. If the husband survives the wife, the assignee is entitled to the property (*q*).

Reversionary
interests.

As to reversionary interests in particular, whether the husband after the assignment dies in the lifetime of the tenant for life, so that the chose in action cannot be reduced into possession, or whether he survives her without having actually reduced it into possession, the result is the same—the chose in action will survive to the wife (*r*). Moreover, a release by a husband of a reversionary chose in action of his wife is as inoperative against his wife as his assignment would be (*s*).

III. *Fraud on marital rights.*

Another head of equitable jurisdiction relating to married women has apparently been rendered obsolete by the provisions of the Act of 1882. As long as it was a general

(*m*) *Anon.*, 2 Vern. 706.

(*n*) *Nash v. N.*, 2 Madd. 133,
139; *Scrutton v. Patello*, 19 Eq. 369,
373.

(*o*) *Hornsby v. Lee*, 2 Madd. 16.

(*p*) *In the goods of Harding*, 2 P.
& D. 394.

(*q*) *Purdew v. Jackson*, 1 Russ. 1.

(*r*) *Ellison v. Elwin*, 13 Sim. 309.

(*s*) *Rogers v. Acaster*, 14 Beav.
445.

rule of law that on marriage a husband became entitled to the property of his wife, Courts of equity were wont to interfere to prevent a wife from committing a fraud on this right, by a secret alienation of her property during the treaty of marriage. The legal right having been destroyed by the Act of 1882, the foundation of the equitable wrong formerly relieved against no longer, it is submitted, exists, and if so, the principles which directed the Courts in the exercise of this branch of their jurisdiction have ceased to be of practical importance. But in a treatise on equity it would, perhaps, not yet be safe to ignore a doctrine which in certain conceivable circumstances may be found still to have some scope for operation.

The leading authority on the principle in question is the case of *Strathmore v. Bowes* (t), in which the principle was fully recognised that a husband may, in a proper case, come into equity, and claim its assistance against a settlement of the wife's property pending the treaty for marriage which is concealed from him.

The first corollary from that case is, that it is necessary for a person impeaching a settlement to prove that at the time of its execution he was the *then intended* husband. He must show that the settlement was made during the course of the treaty for marriage with him (u). If this is so, and the woman during the treaty for marriage holds herself out as entitled to property, and then conveys or settles it without the knowledge or concurrence of the intended husband, actual fraud will be imputed to her, and the deed will be set aside in equity (x).

The principle has been carried in some cases farther than this. In *Goddard v. Snow* (y) there was no active deception of the intended husband, who was, it seems, not aware of the existence of her property. Yet a settlement of which

(t) 1 Ves. sen. 22; 1 W. & T. L. C. 446.

(u) *England v. Downs*, 2 Beav. 522.

(x) *Ibid.*; *Lance v. Norman*, 2 Ch. Rep. 79.

(y) 1 Russ. 485.

he had not been informed was set aside after an interval of ten years, as being a fraud upon his marital right (*a*).

It has been questioned whether a meritorious consideration will suffice to support a settlement, notwithstanding concealment from an intended husband—for instance, the fact that the settlement has been made in favour of children of a former marriage. If such a settlement is made previous to a treaty for a second marriage it is doubtless good (*b*); but it seems that, if made during the treaty for marriage, the fact of there being a provision for children will not render valid a settlement which would on other grounds be fraudulent (*c*).

Valuable consideration.

A transfer for valuable consideration to a purchaser without notice of any intended derogation of the marital right will, however, be held good (*d*), and probably the purchaser's right would be sustained even if he acted with notice (*d*).

Knowledge by husband.

Moreover, if the husband knew of the gift or settlement during the treaty for marriage, although he may not have been informed of it by the intended wife, he will not be able to set it aside (*e*); much less if he concurs in it (*f*). If, likewise, after marriage he acquiesces in or confirms the settlement, he will not be allowed to dispute it (*g*). Mere delay in seeking relief, however, will not necessarily amount to acquiescence (*h*).

Seduction.

If the husband has before marriage seduced his intended wife, and so deprived her of her liberty of action, any settlement she may have made will be sustained against him (*i*).

Limits of the principle.

In the absence of any representation made as to specific

(*a*) *Downes v. Jennings*, 32 Beav. 290; *Taylor v. Pugh*, 1 Ha. 608.

(*b*) *King v. Cotton*, 2 P. Wms. 674.

(*c*) *Taylor v. Pugh*, *sup.*

(*d*) *Blanchet v. Foster*, 2 Ves. sr. 264; *Llewellyn v. Cobbold*, 1 Sm. & G. 376.

(*e*) *St. George v. Wake*, 1 My. &

K. 610; *Ashton v. McDougall*, 5 Beav. 56.

(*f*) *Slocombe v. Glubb*, 2 Bro. C. C. 545.

(*g*) *Maber v. Hobbs*, 2 Y. & C. Ex. 317.

(*h*) *Downes v. Jennings*, *sup.*

(*i*) *Taylor v. Pugh*, *sup.*

property, there is no implied contract of the lady that her property shall be in no way diminished during the treaty for marriage. It is for the Court to determine whether, having regard to the position of the parties and the circumstances of the case, the transaction should be treated as fraudulent or not (k).

(k) *De Mandeville v. Crompton*, 1 V. & B. 354; *Taylor v. Pugh*, *sup.*

SECTION II.—MARRIED WOMEN'S PROPERTY ACT, 1882.

I. *Statutory Separate Property.*II. *Contractual Powers.*

Having now reviewed in detail the methods in which, by an application of the principles of equity, the Courts strove to mitigate some of the disabilities under which married women laboured at common law, it remains to consider the completion of this remedial process by the acts of the legislature, which have now almost placed the husband and wife on a footing of juristic equality.

Divorce Acts. The briefest mention will suffice of the provisions under the Divorce Acts (*l*) for protecting the earnings and other property of married women who have been deserted by, or judicially separated from, their husbands, these being subjects foreign to this work. Nor is it necessary to consider in detail the tentative Married Women's Property Acts of 1870 and 1874 (*m*), which are now repealed. The former of these Acts protected from the husband's power any earnings of a wife acquired in any employment carried on separately from her husband, and secured to her as separate property any real property descending to her as heiress of an intestate during the coverture, and also personal property devolving upon her as next of kin of an intestate, and any sum of money not exceeding 200*l.* to which she became entitled under any deed or will, subject in all cases, of course, to the provisions of any settlement affecting the same. It provided also for the investments

M. W. P.
Acts, 1870
and 1874.

(*l*) 20 & 21 Vict. c. 85; 21 & 22 Vict. c. 108; see also 41 Vict. c. 19; 49 & 50 Vict. c. 52. (*m*) 33 & 34 Vict. c. 93; 37 & 38 Vict. c. 50.

of the separate property, gave powers of the effecting of policies of insurance for the benefit of the wife, and further conferred on a married woman a right of action respecting her separate property. It also made certain provisions, subsequently modified by the Act of 1874, respecting the liability of husband and wife for the ante-nuptial debts of the wife. These it may be necessary to refer to more particularly hereafter, as they remain applicable to the cases of women married prior to 1883.

The provisions of the Married Women's Property Act, 1882 (*n*), are so much wider than those of its predecessors that they may be described as a new body of law, consolidating and to a great extent superseding the results of the cases in equity as well as of the previous Acts (*o*). M. W. P. Act, 1882.

Its provisions may be classified under two fundamental alterations which it introduces into the law respecting married women. These are—

(1.) That “a married woman shall, in accordance with the provisions of the Act, be capable of acquiring, holding, or disposing by will or otherwise of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee.” The right to hold property.

(2.) “A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort or otherwise, in all respects as if she were a *feme sole*” (*p*). The right to contract.

The remainder of the statute in the main consists of provisions for the application of the principles thus broadly expressed.

It is impossible here to exhaustively examine the changes in the law thus effected; but a summary of the salient features of the Act may be set out under the two heads

(*n*) 45 & 46 Vict. c. 75.

(*p*) s. 1, sub-s. (1) (2).

(*o*) Pollock Contr. p. 85, ed. 4.

suggested. (1.) Statutory separate property. (2.) Contractual powers. The powers conferred of suing and being sued as a *feme sole* fall under the head of procedure, and do not here require comment.

1. *Statutory separate property.*

Separate property under the Act.

It will be seen from ss. 2 and 5 of the Act that separate property thereunder is either—(1.) Property acquired by *any married woman* after 31st December, 1882, including her earnings; or (2.) Property belonging at the time of marriage to a woman marrying after that date. In other words, as to women marrying since the Act, all their property is separate property; the husband has no control over it: as to women married before the Act, all their property is their separate property, *except that the title to which accrued before the Act.*

The effect of this exception is to protect any marital rights of a husband which accrued before the Act; and this being so, the doctrine of a wife's equity to a settlement remains operative, as has been above observed, to property falling within it. Apart then from the assertion of this equity as already described, this excepted property is liable to the husband's marital rights as before the Act. Thus a chose in action vested before 1st January, 1883, in a woman married before that date, but not reduced into possession, would be lost to the married woman if reduced to possession by the husband. His interest in such property is not a mere possibility, but a property, subject to the condition that he must reduce it into possession (q).

As to separate property generally, it will be seen that the intervention of trustees being no longer necessary, the necessity of resorting to conveyancers in order to impress on property the character of separate estate, no longer exists. At least the legal estate need only be transferred to trustees when it is desired to impose a restraint on alienation.

Acquisition.

The manner of the acquisition of the property is imma-

(q) *Re Biaggi*, W. N. 1882, p. 65.

terial. In the absence of express agreement to the contrary, all property acquired by or devolving upon a married woman, will be held by her as if she were a *feme sole*. It has been questioned whether the effect of the Act has been to break in upon the common law doctrine of the unity of husband and wife, so that in future a gift to a husband and wife and a third person will confer an equal third of the property on each, instead of, as under the old law, conferring a moiety on the husband and wife, as if they were one person. Judicial opinions seems to be divided on the point, and it is as yet uncovered by decision (*r*).

The enjoyment and management of separate property now pertains to a married woman independent of her husband's control. She is even entitled to an injunction against her husband for the protection of her rights (*s*). Special provisions are contained in ss. 6 to 9 of the Act as to powers of investment, which it is not here necessary to particularise. Holding.

Perhaps the most conspicuous of all the changes effected by the Act are those by which a married woman is now enabled to dispose of all her separate property under the Act as freely as a *feme sole*. Separate property under the Act (as above described) can be aliened where a deed is required without separate examination or deed acknowledged, or the husband's concurrence (*t*). But this does not apply to interests vested before the Act in women married before the Act, such not being separate property under the Act (*u*). Disposition.

Again, complete testamentary power is given to married women as to both real and personal separate property; but it has been held that the power only extends to property of which she is seised or possessed *during coverture*; so that in case of her husband's death, her will must be Testamen-
tary power.

(*r*) *Mander v. Harris*, 27 Ch. D. 166; 24 *ib.* 222.

(*t*) *Riddell v. Errington*, 24 Ch. D. 220.

(*s*) *Symonds v. Hallett*, 24 Ch. D. 346; *Wood v. W.*, 19 W. R. 1049.

(*u*) *Re Harris' Settled Est.*, 28 Ch. D. 171.

re-executed in order to be effectual to pass property subsequently acquired (*x*).

By s. 23 it is enacted, that for the purposes of the Act, the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living. The interpretation of these words is by no means easy; but it is submitted that their effect is no more than to assimilate the administration of the separate property under the Act of a deceased married woman to that of a *feme sole*, but without prejudice to the rights of her husband (*y*). The executor or administrator will at any rate succeed to a complete representation of the deceased's *personal* estate, not merely taking as an appointee under a power as formerly in the case of separate estate in equity. A further consequence of this change will be that separate property under the Act will now be legal assets. It is to be observed the section is not in terms confined to personal estate, but it would be not a little surprising if it should be held that it operates so as to abolish, as far as married women are concerned, all the rules as to the descent of real property. It is submitted that the Act does not interfere with the law as to intestate succession; and that the rights of her heir, and the curtesy of her husband as to realty, and the right of her husband to the administration and beneficial enjoyment of her personalty remain (*z*).

Intestate succession.

As an incident to the possession and enjoyment of property the Act renders a married woman liable to the extent thereof for the maintenance of her husband, children, and grandchildren (*a*).

Married woman trustee, &c.

By ss. 18 and 24 it is provided that a married woman may not only hold separate property beneficially, but she

(*x*) *Stafford v. S.*, 28 Ch. D. 709;
Trye v. Sullivan, *ib.* 705.

(*y*) *Elder v. Pearson*, 25 Ch. D.
620.

(*z*) See rules as to deposits in
post office savings banks, and
Scotch Act, 44 & 45 Vict. c. 21.

(*a*) ss. 20, 21.

may accept the offices of executrix or administratrix or trustee, without her husband's consent, and without rendering him liable for any devastavit which she may commit (b). She is expressly enabled to perform such administrative acts as are necessary in such an office.

2. *Contractual powers under the Act.*

We have seen that the second of the fundamental changes effected by the Act was to confer on a married woman the power of contracting in respect of, and to the extent of, her separate property as if she were a *feme sole*. The Act further adds that every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to, and to bind her separate property, unless the contrary be shown; and that every such contract shall bind not only property possessed by her at the date of the contract, but also all the separate property which she may thereafter incur.

Power to contract conferred.

As a natural consequence of the power thus conferred, we find that a married woman who carries on a trade separately from her husband is, in respect of her separate property, rendered liable to the bankruptcy laws as if she were a *feme sole*.

Bankruptcy.

We have seen that, in equity, although effect was given to the engagements of a married woman, by holding them as binding on her separate estate, the remedy fell short of that which, in the case of a man or a *feme sole*, is juristically incident to a breach of contract, inasmuch as no judgment could be enforced against her personally. And in conformity with this it was held, that judgment could not be signed against a married woman under Ord. XIV. (c).

Limitations of the remedy.

The remedy is, however, enlarged by the above section, though it is still less extensive than that which is available in other cases. Not only does the effect of a restraint on anticipation remain unaffected, so that property subject

(b) See *Re Ayres*, 8 P. D. 168.

(c) *Durrant v. Ricketts*, 8 Q. B. D. 177.

thereto is protected against debts, but apart from this, an unconditional judgment cannot even now be entered up against a married woman. Her power of contracting being limited as above to her separate property, not subject to restraint, the judgment can only operate to this extent, and it must be framed accordingly (*d*). The Act, moreover, has no retrospective operation, so that in the case of a contract made before the Act the only remedy is against separate property belonging to her at the time of the contract (*e*). And again, her contracts being binding only on her separate property, are of no effect, unless she has some separate property at the time of the contract. If the contract is thus good from the beginning the remedy is, by the statute, expressly extended to after-acquired property; but if not, she has no power to bind property to which she may thereafter happen to become entitled (*f*).

By s. 4 separate estate is declared to include any property subject to a general power of appointment which a married woman may have exercised by her will, but such property is not liable in the event of her bankruptcy (*g*).

A wife may enter into a binding contract with her husband as well as with a third person (*h*); but special provision is made by s. 3 of the Act that, in the case of a loan by a wife to a husband, she can only prove in his bankruptcy in respect thereof, after all his other creditors for valuable consideration have been paid in full (*i*).

By s. 11, express provision is made for the effecting of life assurances by husbands and wives for their mutual benefit and that of their children, and for the appointment of trustees of the policy moneys and their protection against

(*d*) *Bursill v. Tanner*, 13 Q. B. D. 691; *Draycote v. Harrison*, 17 *ib.* 147.

(*e*) *Turnbull v. Forman*, 15 Q. B. D. 234; *Conolan v. Leyland*, 27 Ch. D. 632.

(*f*) *Deakin v. Lakin*, 30 Ch. D. 169; *Falliser v. Gurney*, 19 Q. B.

D. 519.

(*g*) *Exp. Gilchrist*, 17 Q. B. D. 167, 521.

(*h*) *Butler v. B.*, 16 Q. B. D. 374; 14 *ibid.* 831; *McGregor v. McG.*, 20 *ibid.* 529.

(*i*) See *Re Genese*, 16 Q. B. D. 700.

the debts of the insured, so long as any of the trusts declared thereof remain unperformed.

The liability of husband and wife for the ante-nuptial debts of the wife is under the various statutes a matter of some complication; but a brief summary of the law thereon must suffice. The case of women married before the Act of 1870 is now of little practical importance. Generally, it may be said that on marriage the husband became liable to all his wife's debts, and the wife, whose property in possession at once passed to her husband, was *ipso facto* released therefrom. Ante-nuptial debts.

The Act of 1870 enacted that a wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy, her debts contracted before marriage as if she had continued unmarried (*k*), and since that Act, a restraint on anticipation has been no protection against *ante-nuptial* debts (*l*). But if no property of the wife was reserved to her separate use on the marriage, there was no remedy against her. The same section relieved the husband from all liability in respect of these debts. Act of 1870.

The Act of 1874 did not affect the wife's liability, but rendered the husband liable for ante-nuptial debts of the wife to the extent of any property passing to him *jure mariti* at the marriage or during the marriage (*m*). Act of 1874.

Both these Acts are repealed by that of 1882, ss. 13 and 14 of which now regulate the liability for ante-nuptial debts of women married since the Act. Under these the wife after marriage remains liable to the full extent of her separate property, and the husband is only liable to the extent of property acquired from or through his wife. It will be seen that he can now only so acquire property by gift, settlement, will, or intestate succession, and the Court is empowered in an action against him to direct an inquiry Act of 1882.

(*k*) 33 & 34 Vict. c. 93, s. 12.

7 Ch. D. 773.

(*l*) *Sanger v. S.*, 11 Eq. 470;
London and Provincial Bank v. Bogle,

(*m*) 37 & 38 Vict. c. 50.

or proceedings for the purpose of ascertaining the value of property so acquired.

The provisions of the Act as to the rights and liabilities of married women in matters of tort, and as to procedure and evidence, are too remote from the subject of equity to call for exposition here (*n*).

(*n*) See ss. 12, 15, 16 and 17 of the Act of 1882, and Smith's M. W. P. Act, 1882, *in loco*.

CHAPTER VIII.

INFANTS.

I. *Guardianship.*

Eyre v. Countess of Shaftesbury.

1. *Obsolete species of Guardianship.*
2. *Guardianship of Parents.*
3. *Testamentary Guardians.*
4. *Guardians appointed by a Stranger.*
5. *Guardians appointed by the Court.*

II. *Maintenance.*

1. *Out of what Property directed.*
2. *In what circumstances.*

III. *Advancement.*

1. *Under a Power.*
2. *In absence of a Power.*

Note.—*Jurisdiction as to Lunatics.*

I. APART from statutory enactments, the Court of Chancery Guardianship, from the earliest times exercised a very beneficial jurisdiction over infants; and that jurisdiction has now been conferred upon the Chancery Division of the High Court of Justice (a). The greater part of the law respecting this subject relates to the incidents and characteristics of guardianship; the first and most important duty before us, therefore, is to enumerate the different species of

(a) 36 & 37 Vict. c. 66, s. 34.

guardians which are recognised in equity, and to ascertain the powers and responsibilities of each.

The fullest discussion of the subject is found in the leading case of

EYRE v. THE COUNTESS OF SHAFTESBURY

[2 P. Wms. 103; 2 W. & T. L. C. 633],

in which the whole jurisdiction of the Court in matters of guardianship was passed under elaborate review. We shall presently have to advert to the precise points raised and settled in this case; but before doing so there are some matters requiring consideration which were only incidentally referred to therein.

1. *Obsolete species of guardianship.*

Obsolete
species of
guardianship.

At different periods of the history of equity, several species of guardianship were recognised which have now little more than an antiquarian interest. Some having been expressly abolished by statute, and others having fallen into desuetude, it is only necessary here to enumerate them: we refer to guardianship in chivalry, guardianship in socage, guardianship by the appointment of the Ecclesiastical Courts, guardianship by election and by custom, and guardianship under 4 & 5 Ph. & Mary, c. 8.

2. *The guardianship of parents.*

Guardianship
of a father.

By nature and nurture the father is indisputably the guardian of his children (*b*), and he may exercise the rights of guardianship even in opposition to their mother (*c*). Until quite recently the Courts so respected this natural right as to refuse, save under very exceptional circumstances, to enforce a contract entered into by a father to give up to his wife the custody and education of their children (*d*), on the ground that it was opposed to public policy. But by 36 Viet. c. 12, it has been enacted that

36 Viet. c. 12.

(*b*) *Exp. Hopkins*, 3 P. Wms. 152.

(*c*) *Exp. M'Clellan*, 1 Dowl. 81.

(*d*) *Hope v. H.*, 8 De G. M. & G. 731; *Swift v. S.*, 34 Beav. 266.

no agreement contained in a separation deed made between the father and mother of an infant shall be held to be invalid by reason only of its providing that the father shall give up the custody or control of such infant to the mother, provided that no Court shall enforce such agreement if it shall be of opinion that it will not be for the benefit of the infant to do so (*e*).

But an agreement by a husband before marriage that his children shall be brought up in a particular religion is not binding on him, and will not be enforced (*f*), unless, indeed, he has by gross moral turpitude forfeited his rights or has abandoned his right to educate his children in his own religion (*g*).

Though no Court has power actually to deprive a father of his legal right as guardian, his exercise of his natural guardianship is subject to the superintendence of the Court, which will, if necessary, interfere between him and his children by appointing a person to act as guardian. This part of its jurisdiction was well established in the case of *Wellesley v. Beaufort* (*h*); but in order to justify such interference there must be strong circumstances showing that it will be for the benefit of the children.

Thus, prior to 36 Vict. c. 12, the mere fact of the father's poverty, or even insolvency, would not suffice (*i*); nor would acts amounting to severity or harshness, unless extreme, or of such a nature as to corrupt the morals of his children (*k*). Even where a father was living in adultery, but did not bring his children into contact with his paramour, the Court refused to deprive him of their custody (*l*).

But where, coupled with insolvency, the character of the

Court superintends guardianship.

When guardianship of father interfered with.

(*e*) See *Condon v. Vollum*, 57 L. T. R. 154.

(*f*) *Agar-Ellis v. Lascelles*, 10 Ch. D. 49; 24 *ib.* 317; *Re Browne*, 2 Ir. Ch. R. 151.

(*g*) *Andrews v. Salt*, 8 Ch. 622, 637; *Re Clarke*, 21 Ch. D. 817.

(*h*) 2 Russ. 1; 2 Bli. N. S. 124.

(*i*) *Kilpatrick v. K.*, Macph. 143; *In re Fynn*, 2 De G. & Sm. 457.

(*k*) *Curtis v. C.*, 5 Jur. N. S. 1147; *Re Spence*, 2 Ph. 252.

(*l*) *Ball v. B.*, 2 Sim. 35.

desertion, father is bad (*m*), or he has deserted his children (*n*), or is endangering their property or neglecting their education (*o*), there is sufficient ground for interference.

immorality. Even in the absence of any pecuniary difficulties of the father, if his habits are notoriously immoral, and such as are likely to corrupt his children, or imbue them with irreligious notions, the Court has not hesitated to remove them from his control (*p*). Habits of habitual drunkenness and profanity have led to the same result (*q*).

2 & 3 Vict.
c. 54.

The power of the Court in this direction has been considerably and advantageously extended by statute. First, by 2 & 3 Vict. c. 54, the Court was enabled to give to a mother access to her children, and even custody of them, up to the age of seven years, in case of ill-treatment by her husband. More recently this Act has been replaced by

36 Vict. c. 12.

36 Vict. c. 12, which empowers the Court upon petition of a mother by her next friend, to give her a right of access to any infant under sixteen years of age at such times and subject to such regulations as may seem proper, or to order that any such infant shall be delivered to the mother and remain under her custody and control until it shall attain that age, subject to such regulations as may seem proper. In determining what under this Act are a mother's rights, the Court will have regard to three matters: the paternal right, the marital duty, and the infant's interest (*r*).

Since by the Judicature Act the rules of equity as to the custody of infants now prevail in all divisions of the High Court, a father can no longer, as formerly, obtain at common law a writ of *habeas corpus* for the possession of a child, where there are equitable reasons against it (*s*).

Apart from statute, it had been decided that in case of

(*m*) *Exp. Mountfort*, 15 Ves. 445.

(*n*) *Creuze v. Hunter*, 2 Cox, 242.

(*o*) *Re England*, 1 R. & M. 499;
Thomas v. Roberts, 3 De G. & Sm.
758.

(*p*) *Shelley v. Westbrook*, Jac.
266; *Wellesley v. Beaufort*, 2 Russ. 1.

(*q*) *De Manneville v. De M.*, 10
Ves. 62.

(*r*) *Re Elderton*, 25 Ch. D. 220;
Re Taylor, 4 Ch. D. 157.

(*s*) *Re Goldsworthy*, 2 Q. B. D.
75; *Re Ethel Brown*, 13 ib. 614.

the death of a father without his having appointed a testamentary guardian as hereafter mentioned, the mother, if surviving, became the natural guardian of the children (*t*). Nevertheless, the natural claims of a mother as to her children were very insufficiently recognized. The statutes already cited operated in some degree to favour her rights, but their operation has been largely superseded by the more extensive enactment presently to be noticed.

Rights of a mother.

3. *Testamentary guardians.*

By 12 Car. II. c. 24, power was conferred upon a father, even though a minor, of appointing by deed or will guardians for his legitimate children during minority. Now, by 1 Vict. c. 26, a minor can no longer make an effectual will for any purpose; but the power of a minor to appoint a guardian by deed still remains. The statute conferred no corresponding power on a mother, and her natural guardianship is superseded by the father's testamentary appointment: the mother, however, may of course be appointed herself to the office.

Testamentary guardians.
12 Car. II.
c. 24.

The hardship wrought on mothers by this Act has but recently been relieved by the provisions of the Guardianship of Infants Act, 1886 (*u*). By this Act it is provided that on the death of the father of an infant, the mother, if surviving, shall be guardian either alone (if no guardian has been appointed by the father) or jointly with any guardian appointed by him. It further enables the mother of any infant by deed or will to appoint guardians after the death of herself and the father of such infant (if such infant be then unmarried); and where guardians are appointed by both parents, they are to act jointly. It also enables her to make a provisional nomination of some fit person or persons to act jointly with the father after her death, and the Court, after her death, if it be shown that the father is for any reason unfitted to be the sole guardian of his

Guardianship Act, 1886.

(*t*) *Villareal v. Mellish*, 2 Swanst. 533.

(*u*) 49 & 50 Vict. c. 27, ss. 2, 3.

children, may confirm the appointment so made, or make such other order in respect of the guardianship as the Court shall think right. Guardians under this Act are to have the powers of guardians appointed under 12 Car. II. c. 24. Further, the Court may, upon the application of the mother of any infant, make such order as it may think fit regarding the custody of such infant, and the right of access thereto of either parent, having regard to the welfare of the infant, the conduct of the parents, and the wishes as well of the mother as of the father (*x*).

How appointed.

No particular form of words is required for the appointment of a testamentary guardian. Such expressions as "my son and daughter to be under the care and direction of A. and B." (*y*), and a direction to C. to "take the care and management of my children" (*z*), have been held sufficient. But where the words used refer only to the property of the children—*e. g.*, "to be guardian of the estate" of the children—they will not constitute a person a guardian (*a*).

Passes by survivorship.

The leading case of *Eyre v. Shaftesbury* (*b*) decides that where more than one guardian is appointed by will the office passes to the survivor. A testator may, under the statute, give to the survivor the power of nominating a successor to one who has died (*c*); but guardianship is not assignable. *Delegatus non potest delegare* (*d*).

Disclaimer.

It is open to a testamentary guardian to disclaim the office before acting therein (*e*); but after acting in the office he cannot renounce it (*f*).

Testamentary guardian a trustee.

A testamentary guardian is a trustee; so that the Statute of Limitations does not run in his favour in an account between him and his ward (*g*). The claim of the ward

(*x*) See *Re Witten*, 57 L. T. R. 336. For rules of procedure under this Act, see W. N. Feb. 4th, 1888.

(*y*) *Bridges v. Hales*, Mos. 108.

(*z*) *Miller v. Harris*, 14 Sim. 540.

(*a*) *Re Norbury*, 9 I. R. Eq. 134.

(*b*) 2 P. Wms. 103.

(*c*) *In the goods of Parnell*, 2 L. R. P. & D. 379.

(*d*) *Mellish v. De Costa*, 2 Atk. 14.

(*e*) *O'Keeffe v. Casey*, 1 S. & L. 106.

(*f*) *Spenceer v. Chesterfield*, Amb. 146.

(*g*) *Mathew v. Brisc*, 14 Beav. 341.

may, however, be lost by a long acquiescence in the acts of the guardian (*h*).

Testamentary guardianship is clearly not determined by the marriage of a male ward (*i*), nor, it would seem, by the marriage of a female ward (*k*).

Office not determined by marriage of ward.

The powers of a testamentary guardian are extensive. He is generally entitled to the custody of the persons of his wards (*l*); and unless some contrary wish is expressed by the father (*m*), he may regulate and superintend their education, and compel their obedience (*n*).

Powers of guardian.

Parental guardianship being subject to the superintendence of the Court, *a fortiori* so also is a testamentary guardian. Under the recent Act above noticed (*o*), the Court may, in its discretion, on being satisfied that it is for the welfare of the infant, remove from his office any testamentary guardian or any guardian appointed or acting by virtue of that Act, and, if it thinks fit, may appoint another guardian in the place of the one so removed.

Superintendence of the Court.

It was held under the earlier and less stringent law that the bankruptcy or insolvency of a testamentary guardian would justify the appointment of a person to take his place (*p*); but the mere fact of a guardian having a pecuniary interest in the death of his ward, will not, as in Roman law, disqualify him for his office, or be a ground for superseding him (*q*).

Bankruptcy.

In the superintendence of testamentary guardians by the Court there is an element to be considered which is wanting in the case of parental guardianship, namely, that the wishes of the father (and now, as we have seen, of the mother also), both express and implied, are regarded with respect; but since in cases where questions as to these

(*h*) *Sleeman v. Wilson*, 13 Eq. 36.

(*i*) *Eyre v. Shaftesbury*, *sup.*

(*k*) *Roach v. Garvan*, 1 Ves. sr. 160.

(*l*) *Exp. E. of Ilchester*, 7 Ves. 381.

(*m*) *Knott v. Cottey*, 2 Ph. 192.

(*n*) *Hall v. H.*, 3 Atk. 721; *Tremain's Ca.*, 1 Stra. 173.

(*o*) 49 & 50 Vict. c. 27.

(*p*) *Smith v. Bate*, 2 Dick. 631; *Heysham v. H.*, 1 Cox, 179.

(*q*) *Morgan v. Dillon*, 9 Mod. 135.

arise the principles applied are similar to those which regulate the conduct of guardians appointed by the Court itself, we shall, to avoid repetition, postpone their discussion until dealing with this last species of guardianship.

4. *Guardians appointed by a stranger.*

Guardians
appointed by
strangers.
Waiver by
father.

The power of a stranger to appoint guardians of an infant during his father's life can only be derived through the waiver of his right by the father. One of the cases most frequently cited with reference to this is *Powel v. Cleaver* (*r*), where a testator gave considerable legacies to his sister, her husband, and their infant children, upon the express condition that his executor should be guardian of the children during minority. The father acquiesced in the arrangement, accepted the benefits conferred upon him, and received the maintenance provided for the children. Afterwards he wished to resume the guardianship himself. This was refused, as not being consistent with the interests of the children (*s*).

It is necessary in such cases that there should have been a voluntary waiver of his rights by the father. The Court will not interfere to compel him to do this simply because a stranger offers to maintain the children (*t*); and it is open to a father to rescind and abandon an agreement of this nature at any time before it has been acted upon so as to alter the status of the child (*u*).

Guardianship created in this manner is of course subject to the supervision of the Court, on the same principles as testamentary guardianship.

5. *Guardians appointed by the Court.*

Guardians
appointed by
the Court.

Whatever may have been its origin, as to which there has been much learned dispute, it was a well established part of the jurisdiction of the Court of Chancery to appoint

(*r*) 2 Bro. C. C. 499.

(*s*) See also *Colston v. Morris*, Jac. 257, n.; *Andrews v. Salt*, 8 Ch. 622, 640.

(*t*) *Lyons v. Blenkin*, Jac. 245, 264; *Re Fynn*, 2 De G. & S. 457.

(*u*) *Hill v. Gomme*, 1 Beav. 540; 5 My. & Cr. 680.

guardians of infants when necessary; and this jurisdiction is now, as we have seen, vested in the Chancery Division of the High Court of Justice.

The jurisdiction arises whenever an action is commenced in Chancery relative to the estate or person of an infant, and none the less because the father or a testamentary guardian is alive (*x*); or if without suit an order for maintenance is made on summons in Chambers (*y*), or on a petition respecting money belonging to an infant paid into Court under the Trustee Relief Act (*z*). In all these cases an infant is said to become a ward of Court. But in order to the exercise of the jurisdiction there must be some property of the infant in its power (*a*); and thus when it is desired to make an infant a ward of Court it is usual to settle a sum of money or other property on him for the purpose (*b*). In addition to the above general powers of the Court, the Guardianship Act, 1886, enables the Court to appoint a guardian or guardians to act jointly with the mother whenever no guardian has been appointed by the father, or whenever the guardian so appointed is dead or refuses to act.

When the jurisdiction arises.

Without any suit pending, and although the infant has no property, the Court may upon petition appoint a guardian under 4 Geo. IV. c. 76, s. 17, to give consent to a marriage (*c*), or make an order for the delivery of an infant to a person who has a right to its custody (*d*); or it may appoint a guardian of the person and estate of an infant; but an infant does not in any of these cases become a ward of Court.

Under 4 Geo. IV. c. 76.

The Court will not ordinarily appoint a married woman (other than the mother) to be a sole guardian (*e*). When two or more guardians are appointed by the Court, the

Married woman not appointed alone.

(*x*) *Butler v. Freeman*, Amb. 303;
De Pereda v. De Mancha, 19 Ch. D.
451.

(*y*) *Re Graham*, 10 Eq. 530.

(*z*) 10 & 11 Vict. c. 96; *Re Hodge's Sett.*, 3 K. & J. 213.

(*a*) *Wellesley v. Beauport*, 2 Russ.
21.

(*b*) *Re Lyons*, 22 L. T. N. S. 770.

(*c*) *Re Woolscombe*, 1 Madd. 313.

(*d*) *Re Spence*, 2 Ph. 247.

(*e*) *Re Kaye*, 1 Ch. 387.

Office does
not survive.

office does not upon the death of one survive, as in the case of testamentary guardianship; there must be a new appointment (*f*).

Father's
wishes
followed.

In the appointment of a guardian the wishes of the father of the infant, if alive, are regarded, even in the case of natural children (*g*); and in their education, his wishes, whether expressed or implied, are usually followed. In the absence of a direction to the contrary, the Court presumes that he desires his children to be educated in his own religion (*h*). And it is immaterial that his religion is not that of the Established Church (*i*). No *pecuniary* benefit to the child will induce the Court to depart from the course of religious instruction pointed out by the father (*k*).

Change of
religion dis-
countenanced.

Where, however, children have been brought up in a particular religion until they have reached such an age as to have formed definite religious opinions, even though in opposition to the wishes of the father, the Court is very reluctant to interfere, because of the peril of unsettling the foundations of all faith by a compulsory change; and the Court has sometimes conversed with the infant to ascertain the extent of its knowledge and the character of such opinions as it has formed (*l*).

Wards not to
be taken out
of jurisdic-
tion, save
under special
circum-
stances.

In general the Court will not allow its wards to be taken out of its jurisdiction (*m*); and if from special circumstances the removal is allowed, security will be required for their return (*n*), and the Court must be kept informed as to their whereabouts and treatment (*o*). The health of a ward (*p*), the desirability of children living with their

(*f*) *Bradshaw v. B.*, 1 Russ. 528.

(*g*) *Peckham v. P.*, 2 Cox, 46.

(*h*) *Re Newbery*, 1 Eq. 431; 1 Ch. 263; *Haucksworth v. H.*, 6 Ch. 539; *Re Clarke*, 21 Ch. D. 817; *Montague v. Festing*, 28 *ib.* 82.

(*i*) *Talbot v. Shrewsbury*, 4 My. & Cr. 672.

(*k*) *Ibid.*, 686.

(*l*) *Witty v. Marshall*, 1 Y. & C. Ch. 68; *Stourton v. S.*, 8 De G. M. & G. 760.

(*m*) *De Manneville v. De M.*, 10 Ves. 52.

(*n*) *Jeffrys v. Vanteswarthwarth*, Barn. Ch. R. 141; *Biggs v. Terry*, 1 My. & Cr. 675.

(*o*) *Anon.*, Jac. 265, n.; *Logan v. Fairlie*, Jac. 193.

(*p*) *Wyndham v. W.*, 1 Kee. 467.

parents (*g*), and the enlistment of a ward in the army (*r*), have been deemed sufficient grounds for permitting a temporary residence beyond the jurisdiction. The question is determined by what the Court esteems to be for the benefit of the infant, always provided that it is satisfied of obedience to its decrees (*s*). To remove a ward from the jurisdiction without leave of the Court is a contempt which will be severely visited on the offender (*t*).

The Court will appoint guardians of an alien infant resident within its jurisdiction, and this notwithstanding that guardians may have been already appointed in the child's own country (*u*); and though foreign guardians are eligible to be appointed, the Court usually prefers a person within its jurisdiction and control (*x*). The jurisdiction does not, however, apply to alien infants resident abroad (*y*). The Court will give effect to the orders of foreign Courts with respect to such children, unless they conflict with our own jurisprudence.

The Court reasonably acts with great circumspection and strictness respecting the marriage of its wards. Whether they be male or female, and whether or not they have parents or guardians living, it is necessary to apply to the Court for permission before their marriage can take place (*z*). To marry a female ward without such permission is a gross contempt of Court, and the husband, together with all persons aiding and abetting the marriage, are liable to imprisonment (*a*); ignorance of the fact that the infant is a ward does not excuse the contempt (*b*). Where there is reason to suspect an unauthorized marriage,

Guardians of
foreign
infant.

Marriage of
wards.

(*g*) *Iethem v. Hall*, 7 Sim. 141.

(*r*) *Rochford v. Hockman*, Kay, 308.

(*s*) *Elliott v. Lambert*, 28 Ch. D. 186.

(*t*) *Rochford v. Hockman*, *sup.*

(*u*) *Stuart v. M. of Bute*, 9 H. L. 440, 464; *Nugent v. Vetzera*, 2 Eq. 704.

(*x*) *Johnstone v. Beattie*, 10 Cl. &

F. 42.

(*y*) *Brown v. Collins*, 25 Ch. D. 56; and see *Re Willoughby*, 30 *ib.* 324.

(*z*) *Smith v. S.*, 3 Atk. 305.

(*a*) *Wortham v. Pemberton*, 1 De G. & Sm. 644; *Exp. Mitchell*, 2 Atk. 173.

(*b*) *Morc v. M.*, 2 Atk. 157; *Herbert's Case*, 3 P. Wms. 116.

the Court will, by injunction, restrain it, and interdict any communication between the ward and her suitor (*c*).

Guardian to
give security.

A guardian appointed by the Court is commonly required to give security that the ward under his care shall not marry without leave of the Court; and if he is suspected of any connivance at an unsanctioned intimacy, the ward will be removed from his care and custody, and committed to the care of others (*d*).

Marriage
settlements.

When the Court grants leave for a marriage to take place, it is careful to see that a proper settlement of the ward's property is made; and to this end it will direct an inquiry in Chambers as to what settlement is proper (*e*). The nature of the settlement depends upon many circumstances, such as the fortune, station and conduct of the husband, and the extent of the property of the ward (*f*).

Where a marriage has taken place without the permission of the Court, the husband will be compelled to execute a proper settlement, and can only purge his contempt by doing so. Such a case will, of course, be treated more strictly against the husband than where he has acted openly; usually the settlement will entirely exclude the marital right and interest (*g*); but this rule has been relaxed where there has been no great difference in fortune between the parties (*h*) and where the husband has acted in ignorance (*i*).

Settlement by
female ward
on majority.

When a female ward of Court comes of age, she may generally settle her property as she pleases; but the Court will so far retain her property as to see that her action is free (*k*). An improper settlement, though made after her attaining majority, may be rectified at her

(*c*) *Pearce v. Crutchfield*, 14 Ves. 206.

(*d*) *Tombes v. Elers*, Dick. 88.

(*e*) *Smith v. S.*, 3 Atk. 305; *Leeds v. Barnardiston*, 4 Sim. 538.

(*f*) *Ball v. Coutts*, 1 V. & B. 303; *Field v. Moore*, 7 De G. M. & G. 691.

(*g*) *Wade v. Hopkinson*, 19 Beav. 613.

(*h*) *Ball v. Coutts*, *sup.*

(*i*) *Richardson v. Merrifield*, 4 De G. & S. 161; and see as to form of settlement, *Re Sampson and Wall*, 25 Ch. D. 482.

(*k*) *Austen v. Halsey*, 2 S. & S. 123, n.

request (*l*), and this has been done after a considerable lapse of time (*m*). Where the Court has approved a settlement, it will not allow its purpose to be defeated by the parties delaying the marriage until the lady is of age (*n*).

Previous to 18 & 19 Vict. c. 43, infants could not make binding settlements on their marriage, nor could the Court give validity to their settlements by adding its sanction (*o*). By that statute (explained by 23 & 24 Vict. c. 83), infants not being under twenty if male, or seventeen if female, can now, with the approbation of the Court, make binding settlements of their real and personal estate in possession or otherwise on their marriage. The Court may, under this Act, direct a settlement of an infant's property after marriage (*p*), but it has no power to compel a ward of Court to make a settlement (*q*).

II. Maintenance.

Another prominent feature in the jurisdiction of the Chancery Division of the High Court of Justice respecting infants is its power in certain cases to make provision for their maintenance out of the income of their property (*r*). The first question is out of what property maintenance can be directed; the second, in what circumstances it will be directed.

1. Out of what property maintenance can be directed.

(1.) The clearest case is where a fund is expressly given to a person for the maintenance of children. This may or

out of what directed.

Express fund.

- (*l*) *Long v. L.*, 2 S. & S. 119. *Potter*, 7 Eq. 484.
(*m*) *Cave v. C.*, 15 Beav. 227. (*q*) *Buckmaster v. B.*, 35 Ch. D. 21; affirmed by H. L. *sub nom.*
(*n*) *Hobson v. Ferraby*, 2 Coll. 412. *Seaton v. S.*, 13 App. C. 61.
(*o*) *Savill v. S.*, 2 Coll. 72. (*r*) *Wellesley v. W.*, 2 Bli. N. S. 133.
(*p*) *Re Sampson and Wall*, *sup.*; *Re Phillips*, 34 Ch. D. 467; *Re*

may not be so done as to create a trust for the children: in the former case the person so receiving the fund is accountable for its proper application; in the latter he is not (s). It is a matter of course depending upon the language of each particular instrument whether there is a trust or not; but where the gift is made to a person who is already legally bound to maintain the children—for instance, to their father—it requires a strong case to establish it as a trust; the presumption is that it is intended to confer a beneficial interest (t).

Income of
express fund.

(2.) More commonly the *income* only of a fund is left for the maintenance of children; and in this case the person to whom it is so given is entitled to receive it as long as he continues properly to maintain them (u), and even though the language be such as to create a trust for maintenance, no account will be directed unless a special case is made out showing that some of the children have not been provided for (x). When some of the children originally comprised in such a gift have come of age, the whole fund remains applicable, if necessary, to the maintenance of those who are still infants; but if this is not necessary, the shares of the adults may be paid them (y).

Under
powers.

(3.) It is usual in wills and settlements which confer property on infants, to insert powers for their maintenance; and under such powers trustees can safely apply either income or capital for that purpose, provided, of course, that their exercise of the power is *bonâ fide* and reasonable (z).

23 & 24 Vict.
c. 145.

It having been found that hardship was often occasioned by the omission of such powers, a general power of applying an infant's property for his maintenance and education was given by Lord Cranworth's Act (a). And by 44 & 45

44 & 45 Vict.
c. 41, s. 43.

(s) *Andrews v. Partington*, 2 Cox, 223.

(t) *Byne v. Blackburn*, 26 Beav.

41. (u) *Hadow v. H.*, 9 Sim. 438.

(x) *Hora v. H.*, 33 Beav. 88;

Raikes v. Ward, 1 Ha. 450.

(y) *Berry v. Bryant*, 2 Dr. & Sm. 1.

(z) *Talbot v. Marshman*, 3 Ch. 622.

(a) 23 & 24 Vict. c. 145, s. 26.

Vict. c. 41, s. 43, it is enacted, that where any property is held by trustees in trust for an infant, either for life or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previous to his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian (if any), or otherwise apply for or towards the infant's maintenance and education, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any other person bound by law to provide for the infant's maintenance or education, or not. This power may be excluded by the expression of a contrary intention in the instrument conferring the infant's interest (*b*), but the section applies whether the instrument comes into operation before or after the commencement of the Act.

The power of maintenance thus given does not apply to property, the vesting of which is or may be postponed beyond the age of twenty-one years (*c*). Lord Cranworth's Act conferred no power to allow maintenance where the infant would not in any event become entitled to the income. Thus where a legacy was given to a child contingently on his attaining twenty-one, but the income was meanwhile to be accumulated as part of the residuary personal estate, maintenance could not be allowed thereout, since the child was not even contingently entitled to the income (*d*). And the same holds good under the present Act (*e*).

Effects of the statutory power.

(4.) In the absence of any such power, directory or statutory, the Court has been wont to allow as maintenance the rents, profits, or income of real or personal property which is vested in possession in an infant (*f*); and if it be so vested, maintenance may be allowed, not-

Maintenance directed by the Court. Out of what fund.

(*b*) *Re Thatcher's Trusts*, 26 Ch. D. 426.

(*c*) *Re Judkin's Trusts*, 25 Ch. D. 743; *Re Bred's Will*, 1 Ch. D. 228.

(*d*) *Re George*, 5 Ch. D. 837.

(*e*) *Re Judkin's Trusts*, *sup.*; *Re Dickson*, 29 Ch. D. 331; 28 *ib.* 291.

(*f*) *Dormer v. D.*, Rep. t. Finch, 432; *Re Howarth*, 8 Ch. 415; but see *Cadman v. C.*, 33 Ch. D. 397.

withstanding that it is liable to be divested by a condition subsequent (*g*).

Maintenance cannot usually be given out of a vested legacy payable at a future day, since it does not carry interest until that time (*h*); still less out of the income of a contingent legacy (*i*). But to these rules there is this important exception, namely, that if a parent or person *in loco parentis* leaves to a child or to children as a class a vested legacy payable *in futuro*, or a contingent legacy, and the child or children is or are otherwise unprovided for, the interest will be allowed as maintenance, from the death of the testator (*k*). But maintenance will not be so allowed if the testator has made an independent provision for it (*k*).

When there are equal legacies to a class of children, to be paid at twenty-one, with survivorship to the others in case of the death of any under that age, the Court will, notwithstanding a direction to accumulate the interest, apply the interest for the maintenance of the whole class, if necessary (*l*); but it cannot do so if there is a gift over in certain events to a stranger (*m*), nor if the class comprises unborn children, who may thus become entitled to the whole (*n*).

The Court will only in extreme cases resort to or authorize the employment of an infant's capital for its maintenance (*o*).

2. *In what circumstances maintenance will be directed.*

When
directed under
the statute,

In both Lord Cranworth's Act (*p*) and 44 & 45 Vict. c. 41, the granting or withholding of maintenance is

(*g*) *Taylor v. Johnson*, 2 P. Wms. 504.

(*h*) *Descrampes v. Tompkins*, 4 Bro. C. C. 149, *u.*; *Crickett v. Dolby*, 3 Ves. 10.

(*i*) *Butler v. Freeman*, 3 Atk. 58; *Hunt v. Parry*, 32 Ch. D. 383.

(*k*) *Inclendon v. Northcote*, 3 Atk. 438; *Brown v. Temperley*, 3 Russ. 263; *Havelock v. H.*, 17 Ch. D. 807; *Collins v. C.*, 32 *ib.* 229.

(*l*) *Marshall v. Holloway*, 2 Swanst. 436; *Re Colgan*, 19 Ch. D. 305.

(*m*) *Exp. Keble*, 11 Ves. 604.

(*n*) *Ibid.*; *Lomax v. L.*, 11 Ves. 48.

(*o*) *Davies v. Austin*, 1 Ves. jr. 247; *Walker v. Wetherell*, 6 Ves. 473; *Barlow v. Grant*, 1 Vern. 255; *Re Tuer's Will Trusts*, 32 Ch. D. 39.

(*p*) *Supra*, p. 424.

expressed to be "at the sole discretion" of the trustees; and it was decided that they might pay it to the infant's father, who as natural guardian was held to come within the words of the Act (*q*). The present Act expressly provides for such a case, but, as before, it appears that the Court will not interfere with the discretion of trustees which is honestly exercised (*r*).

discretion of trustees.

In cases not within the Act, the Court has acted on the principle that the father is bound to maintain his children, and has accordingly refused to allow maintenance out of their property, except in cases where the father has been unable to provide for them in a manner suited to their fortune and position (*s*).

Apart from statute, maintenance not allowed to father.

But if the property in question is the subject of a marriage settlement, the trusts of which are a matter of contract, then if the settlement contains a *trust* for maintenance, a father is entitled to receive a proper sum for the purpose, without reference to his ability (*t*). A mere *power* so to apply the income is not, however, sufficient to entitle the father to this (*u*).

Exception; settled fund.

A married woman having separate estate is now legally liable for the maintenance of her children, and might therefore, perhaps, be considered to fall within the same rules (*x*); but a widow has been held entitled to maintenance for her children without reference to her ability, whether remaining unmarried (*y*), or marrying again (*z*).

Widow is entitled.

In deciding as to the necessity for maintenance, and its amount, the Court will consider the state and condition of the whole family (*a*), as well as the circumstances of the

Condition of whole family considered.

(*q*) *Re Cotton*, 1 Ch. D. 232.

(*r*) *Re Lofthouse*, 29 Ch. D. 921.

(*s*) *Fawkner v. Watts*, 1 Atk. 408;
Mundy v. Howe, 4 Bro. C. C. 224;
Havelock v. H., *sup.*; *Thompson v. Griffin*, Cr. & Ph. 317.

(*t*) *Mundy v. Howe*, *sup.*; *Ransome v. Burgess*, 3 Eq. 773.

(*u*) *Ibid.*; *Wilson v. Turner*, 22 Ch. D. 521.

(*x*) 45 & 46 Vict. c. 75, s. 21.

(*y*) *Lanoy v. D. of Athol*, 2 Atk. 447.

(*z*) *Greenwell v. G.*, 5 Ves. 194;
Douglas v. Andrews, 12 Beav. 310.

(*a*) *Pierrepoint v. Cheney*, 1 P. Wms. 493.

parents (*b*), so as to enable an elder son to provide for his brothers and sisters, or a child to administer to the comforts and necessities of its father and mother.

Distinction
between past
and future
maintenance.

In questions of future maintenance, of course the principal considerations are the extent of the fund and the position in life of the infant; but whatever these may be, in allowing for past maintenance, only that which has been actually and properly expended will be repaid (*c*).

III. *Advancement.*

Advancement
distinguished
from main-
tenance.

For maintenance, as we have seen, the capital of an infant can rarely be resorted to. But in many cases it is evidently to his interest that his capital should to some extent, or even entirely, be laid out for the purpose of providing an occupation for him in the world. Such an application of capital is termed *advancement*, and is subject to rules quite different from those regulating payments for maintenance and education.

1. *Where there is an express power of advancement.*

Under express
power.

Very frequently the instrument conferring property on an infant contains a power expressly authorising advancement. Where this is the case the terms of the power must be strictly complied with (*d*), and if it prescribes the amount which may be so disposed of, that amount cannot be exceeded, unless, at least, the person to be advanced is absolutely entitled to the fund, or the persons entitled in default consent to the application (*e*). If the power is discretionary, the Court will not usually interfere in its exercise (*f*), unless, indeed, the trustees wholly refuse to act or to exercise their discretion (*g*).

Power to
be strictly
followed.

(*b*) *Roach v. Garvan*, 1 Ves. sr. 160.

(*c*) *Bruin v. Knott*, 1 Ph. 572.

(*d*) *Palmer v. Wakefield*, 3 Beav. 227.

(*e*) *Therry v. Henderson*, 15 L. T. 452.

(*f*) *Livesey v. Harding*, Taml.

460; *French v. Davidson*, 3 Mad. 396.

(*g*) *Lewis v. L.*, 1 Cox, 162.

A wide construction is put upon the words "advancement or preferment." They have been held to warrant the purchase of a commission in the army (*h*), apprenticing in the mercantile navy (*i*), the making of marriage settlements (*k*), payment of the expenses of emigration (*l*), and payment for plant and machinery for the purpose of starting a child in business (*m*). What comprised in advancement.

But if a power of advancement is given for a limited purpose—*e. g.*, to buy a commission in the army—and that purpose becomes impossible of execution, the power (differing in this from a bequest for a special purpose) cannot be exercised in any other way (*n*). Limited power.

2. *Where there is no express power.*

In the absence of an express power, trustees can only advance an infant at their own risk, since they will not be allowed the sum paid unless the Court approves (*o*). It is always, therefore, desirable in the first place to seek the authority of the Court. Authority of Court required in absence of a power.

The purposes for which the Court will authorize advancement are similar to those mentioned in the last section (*p*), and need no further illustration.

As a rule, advancement can only be made out of a fund to which the infant is absolutely entitled, but it has been sanctioned in the case of equal legacies to a class with an equal chance of survivorship, after the analogy of maintenance under similar circumstances (*q*). Where, however, there is a limitation over to third parties, trustees can never safely, nor will the Court, break in upon the capital for any purpose, without the consent of those parties (*r*). Out of what funds allowed.

It being a father's duty to advance as well as to main- Advancement

- (*h*) *Cope v. Wilmot*, 1 Coll. 396, n.
- (*i*) *Warr v. W.*, Prec. Ch. 12, 13.
- (*k*) *Lloyd v. Cocker*, 27 Beav. 645;
- Roper-Curzon v. R.*, 11 Eq. 452.
- (*l*) *Re Long*, 38 L. J. Ch. 125.
- (*m*) *Taylor v. T.*, 20 Eq. 155;
- and see *Re Blockley*, 29 Ch. D. 250.
- (*n*) *Re Ward's Tr.*, 7 Ch. 727.
- (*o*) *Lee v. Brown*, 4 Ves. 362, 368.
- (*p*) *Evans v. Massey*, 1 Y. & J. 196;
- Franklin v. Green*, 2 Vern. 137;
- Walsh v. W.*, 1 Drew. 64.
- (*q*) *Franklin v. Green*, *sup.*
- (*r*) *Lee v. Brown*, *sup.*; *Evans v. Massey*, *sup.*

not allowed
to father.

tain his children, he will not be allowed to repay himself what he has advanced, out of the property of his child (*s*); and it is doubtful whether the same would not apply to a mother (*t*); but an advancement will clearly be made for the child if the father is unable to do it (*u*).

NOTE.

Jurisdiction as to Lunatics.

This is a convenient place in which to mention a matter which does not, strictly speaking, fall within the limits of this work—namely, the jurisdiction exercised by the Lord Chancellor and Lords Justices over the persons and property of lunatics or persons of unsound mind.

Jurisdiction
as to lunatics
not in Chan-
cery, but
delegated by
the Crown to
the Lord
Chancellor.

The student cannot be too strongly reminded that this subject formed no part of the jurisdiction of the High Court of Chancery, nor is it now exercised by the Chancery Division of the High Court of Justice. The Crown, by virtue of its prerogative, has the right to assume the care and custody of the persons and estates of those who are of unsound mind. For the purpose of its exercise, the Crown by sign manual delegated its authority usually to the Lord Chancellor, as its highest judicial officer, not, however, *ex officio* as president of the High Court of Chancery. In 1851 the Lords Justices were appointed to constitute a Court of Appeal in Chancery, with all the original and other jurisdiction of the Lord Chancellor in the Court of Chancery (*x*); and shortly afterwards they were entrusted by a warrant under the Queen's sign manual with the care and custody of lunatics. On the passing of the Lunacy Regulation Act (*y*) in 1853, this jurisdiction was confirmed

Lords Jus-
tices.

16 & 17 Vict.
c. 70.

(*s*) *Darley v. D.*, 3 Atk. 397.

(*t*) *Smee v. Martin*, Bunb. 136.

(*u*) *Exp. Hays*, 3 De G. J. & S.

485; *Re Lane*, 17 Jur. 219.

(*x*) 14 & 15 Vict. c. 83, s. 5.

(*y*) 16 & 17 Vict. c. 70.

and continued concurrently with that of the Lord Chancellor. By the Judicature Act, 1875 (z), s. 7, it is enacted that "Any jurisdiction usually vested in the Lords Justices of Appeal in Chancery, or either of them, in relation to the persons and estates of idiots, lunatics and persons of unsound mind, shall be exercised by such judge or judges of the High Court of Justice or Court of Appeal as may be entrusted by the sign manual of Her Majesty or her successors with the care and commitment of the custody of such persons and estates."

Thus from the earliest times down to the present, the jurisdiction in lunacy of certain judges appointed for that purpose by the Crown has been and is something perfectly distinct from the jurisdiction of the Courts of Chancery or of the Chancery Division, and this distinction is illustrated by the fact that in matters of lunacy the appeal from the Lords Justices lies, not to the House of Lords, but to Her Majesty in Council, or, in other words, to the Judicial Committee of the Privy Council (a). If further illustration is required it is well afforded by the case of *Beall v. Smith* (b), where after the institution of a Chancery suit for the purpose of winding up the business of a person of unsound mind not so found by inquisition, an inquisition was granted on petition in lunacy, a verdict of lunacy obtained thereon, and a committee appointed. Further proceedings having been taken in the Chancery suit after this, it was held by the Lords Justices that all such proceedings should be set aside as a contempt upon the jurisdiction in lunacy.

The fact, then, that a person is of unsound mind has, until he is so found by inquisition, no effect whatever on the jurisdiction of the Chancery Division. In itself it neither creates nor destroys any power to deal with such a person or his property. But when, on inquisition held at

Unsoundness of mind does not affect jurisdiction of Chancery.

(z) 38 & 39 Vict. c. 77.
(a) Jud. Act, 1873, s. 18.

(b) 9 Ch. 85.

the direction of the Court in Lunacy, a verdict has been found, and a committee appointed, such committee becomes an officer of the Court, and as such a delegate of the prerogative of the Crown. From that time forward the affairs of the lunatic are under the direction of the Court of Lunacy; in it all proceedings respecting the lunatic's person or estate must be taken; and, as we have seen, the Courts of Chancery have then no longer power to interfere therewith, except under the direction of the judges in lunacy.

Court of
Lunacy ad-
ministrative.

If inquiry be made as to the principles which guide the jurisdiction of the Court in cases of lunacy, the answer is very brief. The function of the Court is purely administrative, and the sole and constant aim and object of attention in the administration is the interest of the lunatic himself (*c*), though it may make allowances out of the lunatic's property to his near relations, where this will tend indirectly to the lunatic's benefit (*d*). In dealing with the lunatic's property, the Court will not suffer itself to be hampered by considering the interests of the real or personal representatives claiming through him; and if, as is elsewhere seen, a conversion is necessary for his interest, there is no equity as between the representatives giving a right on either side to claim a reconversion (*e*).

It would be inappropriate here to enter into any examination of the practice of the administration in lunacy, such a subject being foreign to the scope and purpose of this work. Reference, however, may be made to the Act already mentioned (*f*), as being the foundation of the procedure as at present followed.

(*c*) *Oxenden v. Compton*, 2 Ves. jr. 72; *Exp. Phillips*, 19 Ves. 118.

Re Weld, *ib.* 451.

(*e*) p. 467.

(*d*) *Re Sparrow*, 20 Ch. D. 320;

(*f*) 16 & 17 Vict. c. 70.

CHAPTER IX.

ELECTION, CONVERSION, SATISFACTION, AND PERFORMANCE.

It is a matter of some difficulty to determine the proper place to assign to the subject-matter of this chapter in our classification. In some respects the doctrines of election, conversion, satisfaction, and performance might be conveniently treated under the heading of Administration, since it is almost exclusively in the working out of the administration of estates that the questions which they involve arise. With almost equal propriety they might have found a place under the heading of Trusts, since effect is generally given to them by the application of the theory of Trusts. But it would have greatly encumbered those subjects, already sufficiently comprehensive, to have added so much matter as is necessary for the proper elucidation of the doctrines now in view. On the whole, therefore, it has been thought best, though it may, perhaps, involve some sacrifice of logical precision, to assign a separate chapter to these peculiarly equitable principles. Their relation to the other branches of the subject which we have mentioned will be sufficiently manifest to prevent any confusion resulting from their isolated treatment; while the near relation of these matters *inter se* affords an additional warrant for presenting them to the reader in as close a connexion as possible.

SECTION I.—ELECTION.

I. *General Principle.*Noys *v.* Mordaunt.II. *Conditions of Election.*III. *Election under exercise of Powers.*IV. *Miscellaneous Cases.*V. *Mode of effecting Election.*VI. *Effects of Election.*

Definition.

Election may be defined as the equitable accommodation of two inconsistent or contradictory bequests or benefits, one of which the donor has, strictly speaking, no power to bestow without the consent or co-operation of the donee of the other. The practical application of the doctrine affords a remarkable example of that disregard of the forms of legality to which we have before alluded. That a devise by A. to B. of property belonging to C. should be carried out by any device, legal or equitable, may at first strike the student as almost unintelligible. Examples will show how this result is effected.

One of the most important cases by which the doctrine of election has been established is that of

NOYS *v.* MORDAUNT

[2 Vern. 581 ; 1 W. & T. L. C. 367],

in which the facts were as follows :—John Everard, having two daughters, made his will, devising and bequeathing to Margaret, his eldest daughter, £800 in money and his lands in Beeston, which, under the settlement made on the

testator's marriage, would have descended to the two daughters in equal shares as coparceners. He also gave to Mary, his second daughter, his lands in Stanborn and £1,300 in money, provided, and on condition, that she released, conveyed, and assured Beeston lands to her sister Margaret. Provided, if he should have another daughter, then he gave the £800 devised to Margaret to such after-born daughter; and the lands at Stanborn and the £1,300 devised to Mary to the said Mary and such after-born daughter equally between them.

Another daughter, Elizabeth, was born shortly after his death. Mary married Higgs, and died without issue, without having given any release to Margaret, as required by the will.

Elizabeth claimed not only the lands devised to her by the will, and a moiety of what was devised to Mary, but also a moiety of the Beeston lands devised to Margaret. The question was whether she should be at liberty so to do, or ought not either to acquiesce in the will or renounce any benefit thereby.

Lord Keeper Couper said that in all cases of this kind, where a man is disposing of his estate amongst his children, and gives to one fee simple lands, and to another lands entailed or under settlement, it is upon an implied condition that each party quit and release the other.

I. *General Principle.*

1. The simplest illustration of the well-known equitable Illustration. principle of election may be given in the following form:— If A. gives to B. by will or deed property belonging to C., and by the same instrument gives to C. property belonging to himself, then a Court of equity will allow C. to take the gift made to him by A. only upon the condition of his conforming to the instrument by giving up his own

property to B. He must choose or *elect* whether he will keep his own property and forego the gift, or will accept the gift and give effect to the benefit intended for B. by giving up his property.

Contrast of
English and
Roman doc-
trine.

2. This doctrine rests on the ground that it is inequitable for a beneficiary at the same time to receive a benefit from a donor and refuse to give effect as far as possible to the donor's manifest intention. The limitations to which it is subject in application will presently be seen. In two important particulars the English doctrine of election differs from the corresponding principle in Roman law from which it is probably derived. First, whereas the Roman prætors only applied it in the case of testamentary dispositions, in English Courts of equity it affects equally dispositions by will and dispositions by deed *inter vivos* (a). Secondly, no case of election arose in Roman law where a testator made a bequest of the property of a person under the erroneous supposition that it belonged to himself. Such a bequest was considered void, and the property so referred to might be retained by the person whose it was, while at the same time he received a benefit under the same will. In English equity, however, it is immaterial whether a donor intentionally or under a misapprehension affects to give away property belonging to another person. In either case the person whose property is thus dealt with must conform to the instrument if he would receive a benefit under it (b). This may perhaps be less logically consistent than the Roman rule, but it has the manifest advantage of avoiding the necessity of an inquiry, which is often likely to be exceedingly difficult, as to the degree of knowledge existing in the mind of the donor.

Compensation,
not
forfeiture, the
rule.

3. If, in circumstances which give rise to the doctrine of election, the beneficiary elects to conform to the instrument and part with his own property, no question arises. But

(a) *Llewellyn v. Mackworth*, Barn. Ch. 445; *Green v. G.*, 2 Mer. 86.

(b) *Whistler v. Webster*, 2 Ves. 370; *Griffith-Boscawen v. Scott*, 26 Ch. D. 358.

it is, of course, quite open to him to elect against an instrument which can have no intrinsic power to deprive him of what is his own. It was for some time a question what was the consequence of such an election. In many cases it was held that by refusing to comply with the donor's expressed intention, a person entirely forfeits the benefit which the donor conditionally bestowed upon him (c). On the contrary, by the well-known case of *Streatfield v. Streatfield* (d), followed by a long line of authorities, it has now been established that forfeiture does not result from such non-compliance, and that all that is required from the beneficiary is to make or allow compensation to the person who is disappointed by his election (e). Illustration will, perhaps, make this clearer. If, then, A. gives to B. an estate which belongs to C., and is worth £10,000, and at the same time gives to C. a legacy of £20,000, C., by refusing to part with his estate, will not forfeit the whole of his legacy, but may receive £10,000 thereof, the remaining £10,000 being paid to B. as a compensation for his disappointment in not receiving the estate which was intended for him. The result of the cases has been thus summed up:—

“Firstly: In the event of election to take against the instrument, Courts of equity assume jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation for those whom his election disappoints.”

“Secondly: The surplus after compensation does not devolve as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the Court controlled his legal right” (f).

(c) *Cowper v. Scott*, 3 P. Wms. 124; *Cookes v. Hellier*, 1 Ves. sr. 235.

(d) Ca. t. Talb. 176.

(e) *Gretton v. Haward*, 1 Swanst.

433; *Padbury v. Clarke*, 2 Mac. & G. 298; *Rogers v. Jones*, 3 Ch. D. 688.

(f) Mr. Swanston's note in *Gretton v. Haward*, *sup.*

II. *Conditions of Election.*

Such being the general character of the doctrine, it is now necessary to examine more minutely what circumstances are necessary in order to call it into operation, or to justify its application.

Intention of donor must be clear.

1. There must appear in the instrument itself a clear intention on the part of the donor to dispose of what is not his own (*g*); and, as has been mentioned, if there is such a clear intention, it is immaterial whether he knew the property not to be his own, or erroneously conceived it to be so (*h*).

Where testator has a partial interest.

There is often, however, considerable difficulty in ascertaining precisely what the intention of the instrument is. Thus, if a testator has a partial interest in the property dealt with, it will often be doubtful whether his language is designed to refer to the whole property, and so to affect the interest of another person, or whether it is to be confined to his own partial interest only. In these circumstances the general tendency of the Court is to consider the words as applying only to his own actual interest, and, therefore, against the supposition of an intended election (*i*); but if there is shown a clear intention to pass the entirety, effect will be given to it; and if the owner of the other part takes other benefits by the will, he will be put to his election (*k*).

General devise not extended by extrinsic evidence;

Again, a mere general devise or bequest will only comprehend property of which the devisor is owner, and extrinsic evidence is not admissible to show that a testator considered property to be his own which was not so, and thus intended to comprise it in his general devise or

(*g*) *Forrester v. Cotton*, 1 Eden, 531; *Dillon v. Parker*, 1 Swanst. 359; Jac. 505.

(*h*) *Theelluson v. Woodford*, 13 Ves. 221; *Coutts v. Ackworth*, 9 Eq. 519.

(*i*) *Maddison v. Chapman*, 1 J. & H. 470; *Re Bidwell's Settlement*, 11 W. R. 161.

(*k*) *Padbury v. Clark*, 2 Mac. & G. 298; *Wilkinson v. Dent*, 6 Ch. 339.

bequest (*l*). But the will itself may show such an intention to include in a general expression property not his own as to give rise to a case of election. Thus, an heir in tail has been put to his election by a devise which included an estate tail (*m*), the words used being, "all my real estates" and "all the lands occupied by me." "If," said Sir John Romilly, in that case, "a testator says, 'I give all the property I have in the world to A. B.,' and he leaves a large legacy to his heir in tail, that will not raise a case of election against such heir, because that testator only gives what he has;" but it is otherwise when "there is an intention shown on the face of the will to dispose of the entailed estate away from the heir in tail."

but may by
intrinsic
evidence.

2. As the doctrine of election depends upon compensation, it will not be applicable unless there be an available fund from which compensation can be made. In other words, there will be no ground for election unless the testator or settlor bestows some property actually and absolutely his own on the person who is required to elect.

There must
be a fund
available for
compensation.

This limitation of the principle is most frequently illustrated by cases in which benefits are conferred by the exercise of powers of appointment. A fund over which a person has a mere power of appointment, there being a gift over on default of the exercise of the power, is not the absolute property of the donee of the power. Therefore where a person under a power to appoint among children made an appointment contrary to the terms of the power, a child entitled in default of appointment was allowed to set it aside, notwithstanding that a share had, by the same instrument, been appointed to him (*n*). He was not required to elect, because there was no free disposable property of the appointor given to him which could be laid

Appointments
under powers.

(*l*) *Blake v. Bunbury*, 1 Ves. 523; (*m*) *Honywood v. Forster*, 30 Beav.
Stratton v. Best, 1 Ves. jr. 285; 14; *Beauclerk v. James*, 34 Ch. D.
Clementson v. Gandy, 1 Kee. 309. 160.
(*n*) *Bristowe v. Ward*, 2 Ves. 336.

hold of to compensate the person disappointed. So where a testator had an exclusive power of appointment over an estate to his children and grandchildren, and an exclusive power to appoint a fund to his children only, and he appointed the estate to some of his children, and the fund to his children *and a grandchild*, the children were not called upon to elect in favour of the grandchild, the appointment to whom was *ultra vires*; no property of the testator's own having been given to them by the will (o).

Nor can the doctrine of election be applied where the property belonging to the donee is property which he has no power to assign, such as an equitable life estate in heirlooms before the Settled Land Act, 1882 (p).

No election
between two
claims arising
under the
same instru-
ment.

3. There is no case for election between two or more separate dispositions contained in one instrument. In other words, election only applies between a gift given by some instrument, and a claim *dehors* that instrument (q). Thus, a testatrix who had a power to appoint a fund in favour of her children, who were not *in esse* at the time of the creation of the power, appointed by her will a portion thereof to her son for life, with remainder as he should by will appoint: and there followed a general residuary appointment of the settled fund, subject to all other appointments, to her daughters, to whom benefits out of the testatrix's own property were at the same time given. It was held that the appointment in favour of the appointees of the son was void for remoteness. That portion, therefore, passed under the residuary appointment to the daughters. It was then argued that as the daughters received independent gifts from the testatrix, the appointees of the son could put them to their election between such gifts and the fund accruing to them in consequence of the previous decision; but it was decided that there was no

(o) *In re Fowler's Trust*, 27 Beav. 362.

(p) *Cavendish v. Dacre*, 31 Ch. D.

466; and see *Re Vardon's Trusts*, 31 *id.* 275.

(q) *Cavendish v. Dacre*, *sup.*

case for election, both claims arising from the same instrument (r).

On a similar principle, when by a will two distinct gifts are made to the same person, one of which is onerous and the other beneficial, the donee is not required to elect whether he will accept both or neither. He may, if he pleases, accept the benefit and reject the burden (s). But if the onerous and the beneficial property are included in the same gift, the acceptance of the burden is *prima facie* deemed to be a condition of the benefit, and the donee must elect to take the whole gift or none of it (t).

Beneficial and onerous be-quests.

4. Election only applies in cases of bounty, not to cases of debt. If, therefore, there is a devise to creditors for the payment of their debts, they can accept the benefit of it without any prejudice to their legal rights against other funds disposed of by the will (u). Such was the law before real property was liable to all debts. Since 3 & 4 Will. IV. c. 104, general creditors having a right to proceed against all the property of the deceased, such questions can rarely arise.

Election not applicable to debts.

The principle of election is in itself sufficiently simple and clear, but its application in the ever varying circumstances of practice often involves questions of considerable difficulty. It is only possible here to add as a further illustration some notice of the leading classes of cases on which discussion has taken place.

(r) *Wollaston v. King*, 8 Eq. 165;
Wallinger v. W., 9 Eq. 301.

(s) *Andrew v. Trinity Hall*, 9 Ves. 525.

(t) *Guthrie v. Walrond*, 22 Ch. D. 573; *Re Hotchkys*, 32 *ib.* 408;
Warren v. Rudall, 1 J. & H. 13.

(u) *Kidney v. Coussmaker*, 12 Ves. 136; *Deg v. D.*, 2 P. Wms. 412.

III. *Election arising from the exercise of Powers.*

Appointment
ultra vires and
gift to person
entitled in
default.

1. We have already seen that no election is necessitated by an improper appointment under a power, where no free disposable property of the donor of the power is at the same time bestowed. If, however, an appointment is made to a person who is not an object of the power, and at the same time a gift of the donor's property is made to a person entitled in default of appointment, the principle of election applies. Here, the appointment itself being invalid, the property would naturally pass as if there had been no appointment, to the person entitled in default. But since an independent benefit has been conferred upon him by the same instrument, the conditions upon which the principle of election rests are precisely complied with; and he must either conform to the instrument by giving up his title to the appointed property, or if he insists on that, he will not be suffered to receive the gift conferred upon him (*x*).

Appointment
with direction
to transfer or
attempts to
modify.

2. But it will not suffice to raise a case of election, if after appointing to persons who are objects of the power, and at the same time giving them property of his own, the appointor directs them to settle the property on persons who are not objects of the power (*y*). In short, where there is an absolute appointment to an object of the power, followed by attempts to modify the interest so appointed in a manner which the law will not allow, the Court reads the instrument just as if such attempts had not been made (*z*). *A fortiori* merely precatory words, requesting appointees, objects of the power, to leave the fund appointed to others not objects of the power, will not put them to their election (*a*). A clause of forfeiture on

(*x*) *Whistler v. Webster*, 2 Ves. jr. 367; *Beauclerk v. James*, 34 Ch. D. 160.

(*y*) *Carver v. Bowles*, 2 R. & M. 304; *Churchill v. C.*, 5 Eq. 44.

(*z*) *Woolridge v. W.*, John. 63; but see this case distinguished in *White v. W.*, 22 Ch. D. 555.

(*a*) *Blacket v. Lamb*, 14 Beav. 482; *Langslow v. L.*, 21 Beav. 552.

non-compliance may, however, suffice to necessitate election (b).

3. If the donee of a power by the same instrument appoints to a stranger, and confers benefits out of his own property upon an object of the power, the position is different from that in which the appointment is made to the person entitled in default of appointment. The appointment being invalid, the property passes to the person entitled in default of appointment. He cannot be required to elect, because no gift of the appointor's property is made to him (c). Nor, it seems, can the object of the power be required to elect, because no part of the property subject to the appointment comes to him. It is, indeed, laid down in *Blacket v. Lamb* (d) that such an appointment would give rise to election; but it is submitted that this cannot be so, since the two funds in question never come to the same hand at all. Of course, if the same person is both object of the power and entitled in default of appointment, the case falls within the principle of *Whistler v. Webster* (e), already discussed, and he must elect between the gift and the fund which comes to him in consequence of the invalidity of the appointment.

Appointment
ultra vires and
gift to object
of power.

4. Where there is an attempt by the instrumentality of a power to transgress the policy of the law—for instance, to evade the rule against perpetuities—the Court will not aid such an attempt by applying the doctrine of election (f).

(b) *King v. K.*, 15 Ir. Ch. R. 479; *Boughton v. B.*, 2 Ves. sr. 12.

(c) *Swinburne v. Pitt*, 27 Ch. D. 696.

(d) *Sup.*

(e) *Sup.*

(f) *Wollaston v. King*, 8 Eq. 165.

IV. *Miscellaneous Cases.*

1. Dower.
Express
words re-
quiring
election.

1. At law a widow might by express words be put to her election between her dower and a gift conferred upon her by will (*f*). In equity she may be put to her election by manifest implication, showing an intention of the donor to exclude her from dower (*g*). The principal questions which have arisen in this subject have been as to what amounts to a sufficient indication of intention to bar the legal right to dower.

Evidence of
intention.

It was held that a devise to a widow of part of the lands of which she was dowable was not inconsistent with her claim to dower in the remainder (*h*), nor was the gift of an annuity or rent-charge charged upon the dower lands (*i*). But a direction which prescribed a mode of enjoyment inconsistent with the exercise of dower rights, was deemed sufficient evidence of intention to put her to her election. This was the case, for instance, where a power of leasing the dower lands was given to persons other than the widow (*k*), and when the widow was directed to pay rent (*l*).

Dower Act,
1834.

Since the Dower Act, 1834 (*m*), came into operation, cases as to election respecting dower have become of rare occurrence, dower being now so fully within the power of the husband. Thus by s. 9 thereof a devise of the land is, in the absence of indication of contrary intention, sufficient to bar dower (*n*). A gift of personalty, however, made to the widow, or of any land not subject to dower, will

(*f*) *Gosling v. Warburton*, Cro. Eliz. 128; *Nottley v. Palmer*, 2 Drew. 93.

(*g*) *Birmingham v. Kirwan*, 2 S. & L. 452; *Hall v. Hill*, 1 Dr. & W. 94, 103.

(*h*) *Lawrence v. L.*, 2 Vern. 365.

(*i*) *Holdich v. H.*, 2 Y. & C. C. C. 19; *Harrison v. H.*, 1 Keen, 765.

(*k*) *O'Hara v. Chains*, 1 J. & H. 662.

(*l*) *Birmingham v. Kirwan*, 2 S. & L. 444.

(*m*) 3 & 4 Will. IV. c. 105.

(*n*) *Thomas v. Howell*, 34 Ch. D. 166. See *Rowland v. Culbertson*, 8 Eq. 466; *Lacey v. Hill*, 19 Eq. 346.

not prejudice her right unless a contrary intention is declared (o).

2. Although under the old law a devise to the heir was in a sense inoperative, inasmuch as he was held still to take by descent, and not by purchase as devisee, the leading case of *Noys v. Mordaunt* (p) decided that such a devise was a sufficient gift to raise a case of election between such property and other gifts conferred by the will, and this decision was consistently followed until by 3 & 4 Will. IV. c. 106, it was enacted that such devises should cause the land to pass to the heir as a purchaser. Since this statute there is, *à fortiori*, a case for election under such devises (q).

2. Devise to heir.

3. Where there is a want of capacity to make an effectual will, or where the necessary formalities for the purpose are not complied with, effect will not be given to an invalid disposition by applying the doctrine of election; unless, indeed, the alternative gift is made by way of express condition.

3. Imperfect wills.

Thus, prior to the Will's Act (r), when an infant whose will was valid as to personalty, but invalid as to real estate, gave a legacy to his heir-at-law, and devised his real estate to another person, the heir was not required to elect (s). And so where there was incapacity to make a will owing to coverture, as where a married woman, prior to the Married Women's Property Act, 1882 (t), made a valid appointment by will to her husband, affecting at the same time to bequeath to another a fund not included in the power, there was no case for election, and the husband was entitled to take the bequeathed fund *jure mariti*, without foregoing the benefit of the appointment (u).

4. A person is not obliged to elect between benefits con-

4. Derivative interests.

(o) s. 10.

(p) *Supra*, p. 434.

(q) *Schroder v. S.*, Kay, 578.

(r) 1 Vict. c. 26.

(s) *Hearle v. Greenbank*, 1 Atk. 715; and see *Sheddon v. Goodrich*, 8 Ves. 481; *Gardiner v. Fell*, 1 J.

& W. 22; *Boughton v. B.*, 2 Ves. sr. 12; *Thelluson v. Woodford*, 13 Ves. 209.

(t) 45 & 46 Vict. c. 75.

(u) *Rich v. Cockell*, 9 Ves. 369; *Re De Burgh-Lawson*, 34 W. R. 39.

ferred upon him by an instrument, and an interest which he takes derivatively from another who has elected to take in opposition to the instrument. Thus, where a wife had elected to retain an estate tail against a will, which conferred benefits upon her husband, the husband was held entitled to curtesy in the estate (*x*). Nor is election required where a benefit is conferred by an instrument, and the recipient at the same time claims against the instrument but derivatively from the real owner, who received no benefit therefrom; for instance, where a gift is made to a husband in his own right, and his adverse claim is made as representative of his wife (*y*).

5. Qualified election.

5. Where special directions are given as to election, it may be confined to particular gifts, so as to prevent election as to other parts of the instrument. Thus, in *East v. Cook* (*z*) a testator devised property belonging to his eldest son to his second son, and amongst other gifts to the eldest son he gave him a piece of property which he stated to be in lieu of the piece of property which he purported to take away from him. The eldest son was held to be put to his election only as to those two pieces of property, so that he might retain his own without foregoing the other benefits conferred by the will (*a*).

6. Devise to co-owner.

6. If a testator who has an undivided interest in a particular property devises that property specifically to his co-owner, the devisee must elect between his interest in the property and the interest he takes under the will. General words, however, would, as we have seen, be taken to apply only to the testator's own interest, and would not necessitate an election (*b*).

(*x*) *Cavan v. Pulteney*, 2 Ves. 544; 3 *ib.* 384.

(*y*) *Grissell v. Swinhoe*, 7 Eq. 291; but see *Cooper v. C.*, 6 Ch. 21; 7 L. R. H. L. 53.

(*z*) 2 Ves. sr. 30.

(*a*) See *Wilkinson v. Dent*, 6 Ch. 339, 341.

(*b*) *Miller v. Thurgood*, 33 Beav. 496.

V. *Mode of effecting Election.*

1. Persons who are put to their election are entitled to ascertain the respective values of their own property and of that conferred upon them, and may commence an action to have all requisite accounts taken (*c*). If, however, a cause relative to the same matter is already in existence, the necessary inquiries may be directed therein without the initiation of fresh proceedings (*d*). An election made under a mistake or in ignorance will not be binding (*e*). Account may be required.

2. Special rules apply to cases of election by persons under disability.

Where an infant is required to elect, one of two courses is open. The election may, as in *Streatfield v. Streatfield* (*f*), be deferred until the attainment of full age. Or there may be an immediate reference to Chambers to inquire what course would be most beneficial to the infant (*g*). Sometimes an order has been made without such reference (*h*). Election by infants.

The practice, also, as to election by married women has not been uniform. Usually an inquiry has been directed as to what course is most beneficial, and they are required to elect within a limited time after the report (*i*). Married women.

3. Election may be implied from circumstances, and there is often much difficulty in deciding as to what acts will amount to implied election. As we have seen, any such acts, to be binding on a person who is required to elect, must be done with a knowledge of his rights. They must also be done with a knowledge of the right to elect (*k*), and with an intention of electing (*l*). Mere Implied election.

(*c*) *Buttrick v. Broadhurst*, 3 Bro. C. C. 88.

(*d*) *Douglas v. D.*, 12 Eq. 617.

(*e*) *Pusey v. Desbouvrie*, 3 P. Wms. 315; *Wake v. W.*, 3 Bro. C. C. 255.

(*f*) Ca. t. Talb. 176.

(*g*) *Bigland v. Huddleston*, 3 Bro. C. C. 285, n.; *Ashburnham v. A.*, 13 Jur. 1111.

(*h*) *Lamb v. L.*, 5 W. R. 772.

(*i*) *Davis v. Page*, 9 Ves. 350; *Wilson v. Townsend*, 2 Ves. 693.

(*k*) *Briscoe v. B.*, 7 Ir. Eq. R. 123; 1 J. & L. 334.

(*l*) *Stratford v. Powell*, 1 Ball. & B. 1; *Dillon v. Parker*, 1 Swanst. 380, 387; *Wilder v. Pigott*, 22 Ch. D. 263.

continuance in receipt of the rents and profits of, or the exercise of acts of ownership over, both properties, by a person who has not been called upon to elect, cannot evidently be construed into an election to take one and reject the other (*m*).

Acquiescence. Acquiescence in the enjoyment of one of the properties by other persons may be so long continued as to render it inequitable to disturb them on a plea of ignorance of rights (*n*); but no precise rule can be laid down to limit such time (*o*).

Time. Where a specific time has, as in *Streatfield v. Streatfield* (*p*), been limited for election, a person who does not elect within such time will be deemed to have elected against the instrument.

VI. *The Effects of Election.*

Whom
election binds
generally.

1. Election, whether expressed or implied, by a person *sui juris* and absolutely entitled, of course binds all who claim under him as well as himself. The election, however, of a person having a limited interest, will not bind others who are entitled in remainder (*q*), and each of the successive remaindermen has a separate right of election (*r*). Similarly each member of a class—for instance, next of kin—has a distinct right to elect; the majority cannot bind anyone (*s*).

Election by
married
woman.

2. Election by a married woman binds both her real and personal estate in the hands of her heirs and representatives (*t*), and may be effected without deed acknow-

(*m*) *Padbury v. Clark*, 2 Mac. & J. 298.

(*n*) *Tibbitts v. T.*, 19 Ves. 663;
Dewar v. Maitland, 2 Eq. 834.

(*o*) See *Wake v. W.*, 3 Bro. C. C. 255; *Sopwith v. Maugham*, 30 Beav. 235.

(*p*) Ca. t. Talb. 176.

(*q*) *Ward v. Baugh*, 4 Ves. 623;
E. of Northumberland v. E. of Aylesford, Amb. 540, 657.

(*r*) 1 Swanst. 408, n.

(*s*) *Fytche v. F.*, 7 Eq. 494.

(*t*) *Ardesoife v. Bennet*, 2 Dick. 463.

ledged (*u*). Where she has so elected the Court can order a conveyance to be made accordingly (*u*). Prior to 20 & 21 Vict. c. 57, a married woman could not elect to relinquish a reversionary interest in personalty (*x*), but there is now no reason why such a restriction should continue to exist (*y*). She cannot elect to part with property which is subject to a restraint on anticipation (*z*). But the Court has power to dispense with the restraint with her consent, when it appears to be for her benefit to do so (*a*).

(*u*) *Barrow v. B.*, 4 K. & J. 409.

(*x*) *Robinson v. Wheehright*, 6 De G. M. & G. 535, 546.

(*y*) *Wilder v. Pigott*, 22 Ch. D. 263.

(*z*) *Smith v. Spence*, 27 Ch. D. 606; *Re Vardon's Trusts*, 31 Ch. D. 275, reversing 28 *ib.* 124.

(*a*) 44 & 45 Vict. c. 41, s. 39; *Hodges v. H.*, 20 Ch. D. 749.

SECTION II.—CONVERSION AND RECONVERSION.

CONVERSION.

General Principle.

Fletcher v. Ashburner.

- I. *How effected.*
- II. *Effects of Conversion.*
- III. *Time from which Conversion takes place.*
- IV. *Effects of failure of purposes of Conversion.*
Ackroyd v. Smithson.
- V. *Character of resulting property.*

RECONVERSION.

General Principles.

1. *Persons electing must be sui juris.*
2. *Election does not affect interests of others.*
3. *What amounts to election.*

CONVERSION.

Statement of the principle. It is a familiar maxim that *equity looks upon that as done which ought to have been done*. There is no better illustration of the meaning of this than that supplied by the equitable doctrine of conversion, which is thus expressed by Sir Thomas Sewell in the leading case of

FLETCHER v. ASHBURNER

[1 Bro. C. C. 497; 1 W. & T. L. C. 896]:—

“Money directed to be employed in the purchase of land,
 “and land directed to be sold and turned into money, are
 “to be considered as that species of property into which
 “they are directed to be converted; and this in whatever

“manner the direction may be given—whether by will, “by way of contract, marriage articles, settlement, or “otherwise—and whether the money is actually deposited, “or only covenanted to be paid; whether the land is actually conveyed, or only agreed to be conveyed. The “owner of the fund or the contracting parties may make “land money or money land.” These words are quoted and supported by Lord Alvanley in *Wheldale v. Part-ridge* (b).

The consequences of this doctrine are of very great interest and importance, and being often not a little intricate, they require full and careful consideration. The first inquiry naturally is, how conversion may be effected.

I. *Conversion, how effected.*

Conversion may arise either—(1) from the intention of the owner of the property in question; or (2) by the act of the Court; or (3) of third persons.

1. *Conversion arising by intention of the owner.*

The intention to effect a conversion may be either express or implied. An express direction needs no special consideration; and the leading case already quoted sufficiently illustrates the rule that a direction in a deed or will for the conversion of land into money or money into land will have the effect of impressing upon the property in equity the changed form intended.

But even without express direction conversion may be effected by a clear indication of intention—as, for instance, where a testator gives real estate together with personal estate to be divided into equal shares, and directs some of such shares to be invested in government funds (c). The must be clear.

(b) 5 Ves. 388, 396.

(c) *Mower v. Orr*, 7 Ha. 475.

intention must, however, be clearly apparent; mere ambiguous language will not suffice (*d*).

Optional
powers of
sale

Difficulty is often occasioned by the use of expressions which give to trustees an optional power of sale or investment. Generally speaking no conversion is effected unless the language is imperative. Thus a gift of money upon trust to lay out the same upon a purchase of lands *or* to put the same on good securities (*e*), or a devise of realty with a discretion to sell (*f*), will not effect conversion. The property will remain in the same state in which it is found. But where the direction is imperative, the bestowal of a discretion as to the time of the sale does not affect it; the conversion operates at once (*g*).

sometimes
effect conver-
sion.

In accordance with the rule that the intention of the party if discoverable is to prevail, there are cases in which language giving an apparent option has by the context been considered sufficiently imperative to effect conversion. This has been the case where, after a direction to lay out money in the purchase of land or other securities, words of limitation have been used which are applicable only to real estate (*h*). The same was held in *Earlom v. Saunders* (*i*), where Lord Hardwicke said:—"This Court never admits trustees to have such election to change the right unless it is expressly given to them. Here the money is to be laid out in lands or securities for such uses as the land is before settled. If it is laid out in securities (which are personal) all the limitations might not take place. . . . The only way to make the clause consistent is that the money be laid out on securities till lands are purchased, and the interest and dividends in the meantime to go to such persons as would be entitled to the land." Where trustees had an express option given to them to sell real

Earlom v.
Saunders.

(*d*) *Cornick v. Pearce*, 7 Ha. 477.
(*e*) *Curling v. May*, cited 3 Atk.
255.

(*f*) *Bourne v. B.*, 2 Ha. 35.

(*g*) *Morris v. Griffiths*, 26 Ch. D.
601.

(*h*) *Cowley v. Harstonge*, 1 Dow.
361.

(*i*) Amb. 241.

property and to reinvest on realty or personalty, the new purchase to follow the same trusts, estates, and limitations as the original estate, and they sold and invested on mortgage, it was held that there was a conversion (*k*). The distinction apparently was that in the latter case the trustees had an express power of sale in the first instance, whereas in the former the money was given to them to invest on express limitations, so that their election was only as to temporary investment, not as to the general treatment of the fund.

A somewhat similar distinction is taken when there is a direction to convert at the request of certain persons. If the words of request are merely inserted for the purpose of enforcing the obligation to convert, then, although conversion takes place without a request having been made, it will be considered to have been properly effected (*l*). It was there said: "Nothing is more common than to direct money to be laid out upon request. The object of that is only to ensure that the act shall be done when the request is made, not to prevent it until request" (*m*). But if the words requiring the request or consent are inserted for the purpose of giving a discretion to the persons concerned, and then a sale takes place without such request, it will be considered improper, and there will be no conversion (*n*).

Where, again, a mere discretionary power to convert property is given to trustees, and only a partial conversion is made before the power is extinguished by the death of the trustees, the property must be taken as it is found by those entitled, according to its character (*o*). It is otherwise in the case of an imperative power in the nature of a trust (*p*).

Direction to convert on the request of third persons.

Partial conversion under discretionary power.

(*k*) *Atwell v. A.*, 13 Eq. 23.

(*l*) *Thornton v. Hawley*, 10 Ves.

129.

(*m*) *Per Sir W. Grant, M. R.*

(*n*) *Davies v. Goodhew*, 6 Sim.

585.

(*o*) *Walter v. Maunde*, 19 Ves.

424; *Rich v. Whitfield*, 2 Eq. 583.

(*p*) *Grieverson v. Kirsopp*, 2 Keen,

653.

Express power of sale does not *ipso facto* convert.

E.g., mortgages.

Where from the nature of the transaction there is evidently no intention to convert, an express power of sale will not effect conversion.

This is the case in mortgages. The general intention of a mortgagor is to raise money, not to alter the condition or the mode of devolution of the property. On the death of a mortgagor, therefore, the equity of redemption devolves upon his heir or devisee, notwithstanding a power of sale in the mortgage, and a provision that the surplus moneys arising from a sale shall be paid to the mortgagor, his executors, or administrators. Thus if the sale does not take place till after the death of the mortgagor, his heir or devisee will be entitled to the money; though if the sale takes place in the mortgagor's lifetime the conversion will be complete, and the money will become the personal estate of the mortgagor (*q*).

2. *By act of Court, or third parties.*

Conversion apart from the owner's intention.

In bankruptcy.

There are also cases in which conversion takes place apart from any intention of the owner of the property.

Thus if the real estate of a bankrupt is in his lifetime contracted to be sold, it is considered to be converted; and upon his death intestate his heir-at-law will not be entitled to it, or to any part of it not required for the satisfaction of his debts (*r*).

For benefit of lunatic

In the case of a lunatic, the Court will not generally alter the state of the property so as to affect his successors, but it may do so when it is for the benefit of the lunatic himself (*s*), and when it does so the conversion produces all its natural consequences (*t*).

or infant.

The law with regard to infants seems now to be on the same footing. Previous to the Wills Act (*u*), when an infant might bequeath his personalty at an earlier age than

(*q*) *Wright v. Rose*, 2 S. & S. 323.

(*r*) *Banks v. Scott*, 5 Mad. 493.

(*s*) *Oxenden v. Compton*, 2 Ves. jr. 72; *Exp. Phillips*, 19 Ves. 124.

(*t*) *Exp. Grimstone*, Amb. 706; 4 Bro. C. C. 235; *In re Mary Smith*, 10 Ch. 79.

(*u*) 1 Vict. c. 26.

he could devise his realty, there was great indisposition in the Court to interfere with this right by converting his property, and it was only done in cases of urgent necessity (*x*). But this reason now no longer exists, and there is, therefore, nothing to distinguish the case from that of a lunatic (*y*).

In the absence of special clauses for that purpose, the effect of a Railway Act is not to alter the devolution of property without the consent of the owner; and, therefore, if a company contract with an incapacitated person, as a lunatic, the purchase-money of land will not be deemed to have been converted (*z*).

When land is taken by virtue of compulsory powers under the Lands Clauses Consolidation Act, 1845 (*a*), from a person of unsound mind not so found by inquisition, the better opinion is, that there is no conversion, and on the owner's death intestate his heir will be entitled (*b*). The same rule applies where the land of an infant is taken by a railway company under s. 69 of this Act; the purchase-money retains its character of real estate, and descends to the infant's heir-at-law (*c*).

In the case of a sale of an infant's or a lunatic's property under a decree in a partition action, there is no conversion, and the proceeds of sale retain their character of realty, by virtue of s. 8 of the Partition Act, 1868 (*d*).

Where, however, there was a sale by the consent of a married woman under s. 6 of the Act, the property was held to be converted (*e*).

Purchase under a Railway Act.

Purchase under compulsory powers; 8 & 9 Vict. c. 18.

Lunatic.

Infant.

Sale under Partition Acts.

Married woman.

(*x*) *Exp. Grimstone, sup.*

(*y*) *Dyer v. D.*, 34 Beav. 504; and see *Exp. Bromfield*, 1 Ves. jr. 461; 3 Bro. C. C. 515.

(*z*) *Mid. C. R. Co. v. Oswin*, 1 Coll. 74, 80; *Re Sloper*, 22 Beav. 198, cited.

(*a*) 8 & 9 Vict. c. 18.

(*b*) *Re Tugwell*, 27 Ch. D. 309, dissenting from *Exp. Flamank*, 1

Sim. N. S. 260.

(*c*) *Kelland v. Fulford*, 6 Ch. D. 491.

(*d*) 31 & 32 Vict. c. 40. *Foster v. F.*, 1 Ch. D. 588; *Re Barker*, 17 Ch. D. 241; *Mordaunt v. Benwell*, 19 Ch. D. 302.

(*e*) *Wallace v. Greenwood*, 16 Ch. D. 362.

II. *The effects of Conversion.*

These may be most conveniently discussed by distinguishing the case of the conversion of money into land from that of land into money.

1. *Of money into land.*

Money converted into land acquires properties of land.

Generally speaking, money directed to be laid out in land, whether by contract or will, acquires all the properties of land. Thus it will descend as land to the legal heir (*f*). In what character it will be taken by an heir will be presently considered (*g*). It will pass by a general devise (*h*), and not by a general bequest (*i*). It will be subject to tenancy by the curtesy (*k*); but was not subject to dower, while it did not attach on equitable estates (*l*). Now, by virtue of 3 & 4 Will. IV. c. 105, it presumably would be so.

Exceptions.

But in some respects money directed to be laid out in land is not impressed with the quality of land. It is not deemed land for fiscal purposes, but is liable to legacy, not to succession, duty (*m*). And where, by order of the Court in lunacy, money of a lunatic was laid out in land, on the death of the lunatic the land was held to be part of the lunatic's personal estate, liable to probate duty (*n*).

2. *Of land into money.*

Land into money.

Following the analogy of the converse case, land notionally converted into money will pass to the personal representatives of a deceased person (*o*), or will be included under a general residuary bequest (*p*), and will not be affected by a devise of land (*q*). An alien, even previous

(*f*) *Seudamore v. S.*, Prec. Ch. 543.

(*g*) p. 457.

(*h*) *Greenhill v. G.*, 2 Vern. 679.

(*i*) *Edwards v. C. of Warwick*, 2 P. Wms. 171.

(*k*) *Sweetapple v. Bindon*, 2 Vern. 536.

(*l*) *Cunningham v. Moody*, 1 Ves. sr. 174, 176.

(*m*) *Re De Lancy*, 6 L. R. Ex. 102.

(*n*) *Att.-Gen. v. M. of Ailesbury*, 12 App. C. 672; 16 Q. B. D. 408; 14 *ibid.* 895.

(*o*) *Ashby v. Palmer*, 1 Mer. 296.

(*p*) *Stead v. Newdigate*, 2 Mer. 521.

(*q*) *Elliott v. Fisher*, 12 Sim. 505.

to 33 Vict. c. 14, was entitled to the proceeds of sale of land devised to be sold for his benefit (*r*). The proceeds of sale of a real estate directed to be sold are liable to legacy duty (*s*); and, it seems, to probate duty (*t*).

There are exceptions also in this case: thus money to arise from sales of land is within the provisions of the Mortmain Act (*u*). It, however, does not escheat to the Crown upon a failure of heirs, nor has the Crown any right to come into equity to ask that the land shall be converted in order that it may take as *bona vacantia*. Even if it has been actually converted, but unnecessarily so, the Crown cannot make good its claim (*x*).

How far retaining quality of land.

3. *Character of converted property.*

We have seen that money directed to be laid out in land acquires the descendible property of land, so as to pass in case of intestacy to the heir. The question then often arises as to the character in which the heir receives it—that is, whether it becomes his real or his personal property. This is evidently an all-important inquiry as between his representatives, when the heir thus receiving the converted money dies without having made any disposition thereof. The nature of the property in the hands of the heir has been held to depend upon the manner in which the conversion has taken place.

Nature of converted property.

Depends on manner of conversion.

First, if the converted money was bequeathed to be invested in land for the use of A. and his heirs, or on his marriage money has been paid by him, or paid or covenanted to be paid by a stranger to trustees, to be laid out in land and settled in strict settlement, with remainder to the heirs of A., then A. will hold the converted money as

Bequest.

(*r*) *Du Hourmielin v. Sheldon*, 1 Beav. 79; 4 My. & Cr. 525.

(*s*) 55 Geo. III. c. 184; *Att.-Gen. v. Holford*, 1 Pri. 426.

(*t*) *Re Goods of Gunn*, 9 P. D. 242; *Att.-Gen. v. Lomas*, 9 L. R. Ex. 29; but see *Matson v. Swift*,

8 Beav. 368.

(*u*) 9 Geo. II. c. 36; *Att.-Gen. v. Weymouth, Amb.* 20; *Brook v. Badley*, 4 Eq. 106; 3 Ch. 672.

(*x*) *Taylor v. Haygarth*, 14 Sim. 8; *Cradoch v. Owen*, 2 Sm. & G. 241.

land, and on his decease, his heir will be preferred to his personal representative (*y*).

Covenant.

Secondly, if A. has covenanted to lay out a sum of money in land to be settled on himself for life, remainder to his wife for life, remainder to the issue of the marriage, and he dies leaving his wife or any issue of the marriage surviving him, then also the conversion continues to operate; and on the death of the wife and issue, the heir of A. will be entitled to it (*z*).

But if, in such a case as the last, A. does not leave any wife or issue him surviving, then on his decease his personal representative will be entitled; the distinction being, that in this case the obligation to lay out the money and the right to call for it have become centered in the same person, so that the covenant may be considered discharged. There is then no equity left in his heir to call for the money from his personal representative (*a*).

Principle of the distinctions.

The principle may perhaps be thus expressed: if at the death of the person first entitled to the converted fund there still exists an enforceable obligation to convert it, the effect of the conversion continues, and the heir takes; but if previous to his death this obligation ceases, the right to demand and the duty to effect the conversion centering in the same person, then the effect of the conversion ceases, and on his death his personal representative takes (*b*).

III. *Time from which Conversion takes place.*

General rule as to time of conversion,

Many important questions depend upon the question as to the precise time from which the doctrine of conversion

(*y*) *Scudamore v. S.*, Prec. Ch. 543; *Disher v. D.*, 1 P. Wms. 204.

(*z*) *Kettleby v. Atwood*, 1 Vern. 298, 471.

(*a*) *Chichester v. Bickerstaffe*, 2 Vern. 295; *Pulteney v. Darlington*, 1 Bro. C. C. 223.

(*b*) *Wheldale v. Partridge*, 8 Ves. 235.

begins to operate upon the property concerned. The ^{when directed.} general principle is that where an absolute conversion is directed to be made, it takes effect at the time at which the instrument directing it comes into operation. Thus in the case of a will the conversion takes place at the death of the testator (*c*). In the case of a deed it takes place at the date of the execution and delivery (*d*); and this notwithstanding that the actual transmutation is directed not to take place until a future time (*e*).

When conversion takes place not under the intention of the owner, the time of its operation depends upon circumstances. Thus in the case of the sale of a bankrupt's real estate, if such sale takes place after the death of the bankrupt, no actual conversion having taken place in his lifetime, whatever remains after satisfying the creditors will belong to his heir-at-law (*f*), though, as we have seen, if the sale took place in his lifetime the surplus would pass to his next of kin. Thus conversion only takes place at the time of the contract for sale. ^{In bankruptcy.}

A mere notice to treat by a company having compulsory powers of purchasing land will not operate as a conversion thereof into personalty (*g*). As soon, however, as the quantity and price are fixed between the landowner and the company, conversion takes place (*h*). The same is the case when the price is fixed by arbitration (*i*), by valuation (*k*), or by verdict of a jury (*l*). The actual time of conversion is the completion of a binding agreement if voluntary, or the ascertaining of the definite terms of the transaction if compulsory (*m*). ^{In compulsory purchases.}

(*c*) *Beauclerk v. Mead*, 2 Atk. 167; *Morris v. Griffiths*, 26 Ch. D. 601.

(*d*) *Griffith v. Ricketts*, 7 Ha. 299.

(*e*) *Hewitt v. Wright*, 1 Bro. C. C. 86; *Clarke v. Franklin*, 4 K. & J. 257.

(*f*) *Banks v. Scott*, 3 Madd. 493.

(*g*) *Haynes v. H.*, 1 Dr. & Sm. 426; *Exp. Arnold*, 32 Beav. 591;

Richmond v. N. L. R. Co., 5 Eq. 352.

(*h*) *Exp. Hawkins*, 13 Sim. 569.

(*i*) *Harding v. Met. Ry. Co.*, 7 Ch. 154.

(*k*) *Watts v. W.*, 17 Eq. 217.

(*l*) *Haynes v. H.*, *sup.*

(*m*) See also *Re Dykes' Estate*, 7 Eq. 337; *Re M. & S. R. Co.*, 19 Beav. 365.

Where conversion depends on the option of a third person.

In a case in which the conversion is not absolutely directed, but is made to depend upon the option of another person, the same general rule applies. Thus where a farm was leased to A. for seven years, and on the lease was endorsed an agreement that A. should have an option within a given time of purchasing the inheritance for £3000, it was held that the conversion took place as from the execution of the lease; and the lessor having died before the option of purchase was exercised, the money was treated as part of his personal estate (*n*). Nevertheless, until the option in such a case is exercised, the rents and profits go to the person entitled to the real estate (*o*). The result, therefore, is that the ultimate destination of the property depends entirely upon the choice of the person who has the option of purchase. If he elects not to purchase, it remains real estate; if he elects to purchase, it is deemed converted into personal estate, and the conversion relates back to the time when the option was given.

Intention prevails if ascertainable.

Such is the case where there is nothing to indicate a contrary intention on the part of the original owner; but like all secondary rules respecting the construction of instruments, it is subject to the primary rule that the intention of the owner, where it can be ascertained, is to prevail. If, therefore, in the instrument by which the option is given, there is an express direction that the purchase-money shall be paid to the person who is then the owner of the estate, he alone will be entitled to it (*p*). And if, *after* having given an option of purchasing certain real estate, a testator *specifically* devises the same estate, this amounts to a sufficiently clear indication of intention respecting it to entitle the devisee to the purchase-money when the option has been exercised (*q*). No such intention would be inferred from a mere *general* devise, after the

(*n*) *Lawes v. Bennett*, 1 Cox, 167.
 (*o*) *Townley v. Bedwell*, 14 Ves.
 591; *Exp. Hardy*, 30 Beav. 206.
 (*p*) *Re Graves Minor*, 15 Ir. Ch.

Rep. 357.

(*q*) *Drant v. Vause*, 1 Y. & C. Ch.
 580; *Emuss v. Smith*, 2 De G. & S.
 722.

agreement(*r*); nor if the agreement for the optional purchase is made *subsequently* to the will containing a specific devise of the property (*s*).

IV. *Effects of failure of the purposes for which Conversion is directed.*

1. *Where conversion is voluntary.*

The general rule is, that when a conversion is directed by will, and the purpose for which the conversion was intended totally fails before the will comes into operation, that is, in the testator's lifetime, no conversion will take place, and the property so directed to be converted will result to the testator in its original form unchanged (*t*).

Total failure
no conversion.

"Every conversion, however absolute in its terms, will be deemed to be a conversion for the purposes of the will only, unless the testator distinctly indicates an intention that it is, on the failure of those purposes, to prevail as between the persons on whom the law casts the real and personal property of an intestate, namely, the heir and next of kin" (*u*).

If the failure is but partial, conversion will take place only to such extent as is necessary to effect the purpose of the will. And, in as far as it is not required for that purpose, the property will result unchanged. Thus in

Partial failure; conversion takes place only so far as necessary.

ACKROYD v. SMITHSON

[1 Bro. C. C. 503; 1 W. & T. L. C. 949]

a testator gave several legacies, and ordered his real and personal estate to be sold, and his debts and legacies to be paid out of the proceeds of the sale: he gave the residue

(*r*) *Collingwood v. Row*, 5 W. R. 484.

(*s*) *Weeding v. W.*, 1 J. & H. 424.

(*t*) *Hill v. Cock*, 1 V. & B. 175; *Fitch v. Weber*, 6 Ha. 145.

(*u*) 1 Jarm. Wills, 623, 4th ed.

thereof to certain legatees in the proportion of their legacies. Two of these residuary legatees died in the lifetime of the testator. It was held that these lapsed shares, so far as they were constituted of personal estate, should go to the testator's next of kin, and so far as they were constituted of real estate to his heir, notwithstanding the directed sale. Even where there was a direction that the proceeds of real estate should be deemed personalty, and it was expressly declared that it should not lapse for the benefit of the heir-at-law, the heir-at-law was held not to be excluded. It was considered that the declaration was only intended to apply as far as conversion was required for the purposes of the will, and that it did not prevent the law from dealing with a surplus in accordance with its usual rules (*x*). The heir will only be excluded by a gift over, in case of a lapse (*x*).

The same result follows where money arising from land directed to be sold is given over on an event which never happens (*y*), and where the whole or a part of the purpose for which it is given fails for illegality, as, for instance, being void under the Mortmain Act (*z*), or being so limited as to transgress the rule as to perpetuities (*a*).

Rule applies whether land be converted into money or *vice versa*.

Blending of proceeds of sale and personalty immaterial.

Effect of gift over.

The rule that conversion takes place only so far as the purposes of the will require, applies equally whether it be land converted into money, or money into land (*b*). And it will have been seen from the cases of *Ackroyd v. Smithson* and *Jessop v. Watson*, above referred to, that it is immaterial that there is a blending of the proceeds of sale of realty with the personalty.

So far we have considered only those cases in which, there being a failure of the purposes for which conversion is directed, the conflict as to who shall take the lapsed

(*x*) *Fitch v. Weber*, 6 Ha. 145;
Collins v. Wakeman, 2 Ves. jr. 683.

(*y*) *Jessop v. Watson*, 1 My. & K.
665.

(*z*) *Att.-G. v. Lord Weymouth*,

Amb. 20.

(*a*) *Burley v. Evelyn*, 16 Sim.
290.

(*b*) *Cogan v. Stephens*, 1 Beav.
482, n; *Simmons v. Pitt*, 8 Ch. 978.

property is only between the heir and next of kin. The testator, however, may provide for a lapse by making a gift over of the property which may be thus released. If such a gift over is specific and clear, no difficulty arises; but conflict is often occasioned where the only gift over is in the form of a residuary devise or bequest; it being frequently open to question whether such residuary gift was intended to comprise the undisposed-of shares.

One class of cases is that in which the dispute is between the heir and a residuary legatee. In *Maugham v. Mason* (c) a testator devised freeholds to trustees and their heirs upon trust to sell and to apply the proceeds of sale towards the payment of debts and legacies, the rents until sold to be applied to the same uses, and, after giving some pecuniary and specific legacies, as to the rest residue and remainder of his personal estate after payment of his debts, legacies, and funeral expenses, he bequeathed the same to his trustees, their executors, administrators, and assigns, upon trust, to convert all the said residue into ready-money, and to lay out the same in the purchase of freehold property to be settled as therein mentioned. The executors in fact paid all the debts, legacies, and funeral expenses out of the personal estate, and did not sell the freeholds. It was held that the freeholds resulted to the heir-at-law, and were not comprised in the residuary bequest. The principle was that the conversion was only directed for a particular purpose, and as that purpose never required it, there was no conversion, and consequently none of the results of conversion followed. If, however, the testator had declared expressly that the proceeds of the real estate should be considered a part of the personalty, the case would have been otherwise; that would have shown that the conversion was not merely intended to be for a particular purpose, but to be absolute, carrying with it all its consequences; and the proceeds of sale would accordingly be included in the

Residuary
legacy.
Maugham v.
Mason.

(c) V. & B. 410.

Intention to exclude the heir must be clear.

Residuary devise.

Failure of purposes of conversion in settlement *inter vivos* resulting to settlor.

Sale under order of the Court.

residuary bequest (*d*). Apart even from such an express declaration, there may be in the circumstances of the case such an indication of intention as will lead to the same result; the blending of the proceeds of sale with the personality supplies an argument in favour of such an intention (*e*). The intention to exclude the heir must, however, be clear. *The true test is, whether the conversion is directed only for particular purposes or is intended to be absolute* (*f*).

The cases are now rare in which there is a conflict between the heir and the residuary devisee, since, by the Wills Act (*g*), s. 25, it is enacted that unless a contrary intention appears in the will, such real estate or interest therein as shall be comprised, or intended to be comprised, in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will. As to the law in cases not within this Act, reference may be made to *Collins v. Wakeman* (*h*); *Jones v. Mitchell* (*i*).

In the case of a failure of the purposes of conversion under an instrument *inter vivos*, the property results to the settlor or grantor. In what character he takes it, as between his real and personal representatives, we shall presently inquire.

2. Conversion by order of the Court.

It has been decided that the doctrine of *Ackroyd v. Smithson* does not apply to the case of a sale under an order of the Court. Where lands were sold in order to raise the costs of an infant's partition suit, it was held that the personal representative was entitled to the surplus (*k*).

(*d*) *Kidney v. Coussmaker*, 1 Ves. jr. 436; *Bright v. Lareher*, 3 De G. & J. 156.

(*e*) *Byam v. Munton*, 1 R. & M. 503; *Court v. Buckland*, 1 Ch. D. 605.

(*f*) *Amphlett v. Parke*, 2 R. & M. 221.

(*g*) 1 Vict. c. 26.

(*h*) 2 Ves. jr. 683.

(*i*) 1 S. & S. 290.

(*k*) *Steed v. Preece*, 18 Eq. 192.

The sale being properly made there was an immediate conversion, and there was no equity to effect a reconversion. The case, therefore, rather resembles in principle an instance of conversion under a deed, than the case of a partial failure of the purposes of conversion under a will. The conversion in such cases takes effect from the date of the order for sale (l).

Complete conversion notwithstanding partial failure,

The rule, however, is of course subject to any statutory provisions which apply in particular cases. Thus, where real estate to which infants were entitled was sold under a decree in a partition suit, the proceeds of sale were, by s. 8 of the Partition Act, 1863 (m), treated as realty (n). In the case of a sale under the same circumstances of the separate estate of a married woman, the question of conversion depends upon her consent. If she consent, there is a conversion; if not, there is no conversion (o).

unless statutes direct the contrary.

Partition Act.

V. In what Character Unconverted Property results.

The next inquiry is, whether an heir who takes land directed to be sold, on failure of the purposes of conversion, takes it as real or as personal property; and a similar inquiry follows respecting the next of kin taking under analogous circumstances. The questions often arise between the real and personal representatives of the persons thus benefitting by the resulting trust.

1. First as to an heir taking land directed to be sold on a lapse.

Where conversion is directed by will, and there is a failure of the purposes for which it is directed, the quality in which it results to the heir depends upon the question,

Heir takes lapsed land where conversion directed by

(l) *Hyett v. Meakin*, 25 Ch. D. 735.

(m) 31 & 32 Vict. c. 40.

(n) *Foster v. F.*, 1 Ch. D. 588.

(o) *Wallace v. Greenwood*, 16 Ch. D. 62; *Mildmay v. Quicke*, 6 Ch. D.

553; *Kelland v. Fulford*, 6 Ch. D. 491.

will; if sale
is necessary,
as personalty.

whether an actual sale is required for the purposes of the will. If such a sale is necessary, then, whether it has actually taken place or not before the death of the heir, the property results in a converted form as personalty; and will, on the death of the heir intestate, pass to his next of kin (*p*).

If sale not
necessary, as
land.

On the contrary, if there is no necessity for any sale in order to carry out the trusts of the will—if, for instance, there is a total failure of the purposes of conversion—then the property results to the heir as realty, and will on his death intestate descend to his heir (*q*). And if a sale has unnecessarily been effected, this will not vary the rights of the parties (*r*). But the question as to the necessity of the sale is determined by the state of facts at the testator's death (*s*).

Under in-
struments
inter vivos,
if purpose
fails *ab initio*,
no con-
version takes
place.
If failure
is only partial
it results in
its converted
form.

In the case of a conversion arising under an instrument *inter vivos*, the question takes a somewhat different form. In this case, if there be an entire failure of the purposes of conversion *ab initio*, no conversion is deemed to have taken place at all, and the property results to the settlor or grantor in its original form (*t*). If there is only a partial failure, then the conversion operates, in accordance with the usual rule, from the execution and delivery of the deed, and having once taken place, whatever results, results in its converted form (*u*). It will be observed that the underlying principle is just the same as in the case of a will. In each case *the quality of the resulting property depends upon the question of the necessity for actual conversion*.

Money
directed to
be laid out
in land.

2. When money is directed to be laid out in land, and the purposes for which conversion was directed partially

(*p*) *Smith v. Claxton*, 4 Madd. 492; *Wright v. W.*, 16 Ves. 188.

(*q*) *Chitty v. Parker*, 2 Ves. jr. 271; *Buchanan v. Harrison*, 1 J. & H. 673.

(*r*) *Davenport v. Coltman*, 12 Sim. 610.

(*s*) *Carr v. Collins*, 7 Jur. 165; 1 Jarm. Wills, 631, ed. 4.

(*t*) *Hewitt v. Wright*, 1 Bro. C. C. 86; *Clarke v. Franklin*, 4 K. & J. 257.

(*u*) *Griffith v. Ricketts*, 7 Ha. 299; *Wheldale v. Partridge*, 8 Ves. 236.

fail, the money in so far as not required results as to the personal representative (*x*); and in all cases, whatever results, results as real estate (*y*).

Whatever results on failure results as realty.

RECONVERSION.

Although land directed or agreed to be converted into money, or money directed or agreed to be converted into land, are, as we have seen, at once impressed in equity with a new character, still it is open to a person receiving the converted property, if not under disability, to elect to take it in its original state. It has been said that "equity, like nature, will do nothing in vain" (*z*); and it would evidently be vain and useless to insist that a person should take a fund in the quality of land, when he prefers it in the form of money, and can at any moment reduce it to that form by a sale. It is necessary to consider certain rules which regulate this power of electing against an instrument which directs conversion.

Election to take in unconverted form.

The right of electing to reconvert is simple enough when the person claiming to do so has an absolute interest in the property in question. It is to be observed, however, that the presumption is against reconversion. In case of any dispute as to the fact, the *onus* of proof is on those who allege that the owner has elected to take in the original form rather than in that directed by the instrument which effected the conversion (*a*). Further :

Presumption against re-conversion.

1. *The person affecting to elect must be sui juris.*

Thus a lunatic cannot elect (*b*); neither can an infant (*c*);

Person electing must be *sui juris*. Lunatic.

(*x*) *Cogan v. Stevens*, 1 Beav. 482.

(*y*) *Curteis v. Wormald*, 10 Ch. D. 172, overruling *Reynolds v. Godlee*, 1 Johns. 536.

(*z*) *Seeley v. Jago*, 1 P. Wms. 389.

(*a*) *Sisson v. Giles*, 3 De G. J. & S. 614; 11 W. R. 971; *Benson v. B.*, 1 P. Wms. 130.

(*b*) *Ashby v. Palmer*, 1 Mer. 296.

(*c*) *Carr v. Ellison*, 2 Bro. C. C.

56.

but in some cases, where it has been manifestly for his advantage, the Court has elected for him (*d*); and in either case the Court may direct an inquiry as to whether it is for the benefit of the infant or lunatic to reconvert.

Married
woman.

A married woman with respect to her separate estate is regarded as *sui juris*, and is competent to elect (*e*). With regard to property not so limited, the law prior to the Married Women's Property Act, 1882 (*f*), depended upon the Fines and Recoveries Act (*g*). Previous thereto she could not, where money was directed to be laid out in land, alter its nature by contract or deed (*h*). She might, however, elect to take it as money by consent after examination in Court (*h*), and the same result was sometimes reached by the device of making a sham purchase. By s. 77 of the last-named Act, she was enabled by deed acknowledged to effectually elect to take as money (*k*). Under the same section, she might, in the same manner, elect to take in its original form real estate directed to be converted into money (*l*), even though it be reversionary (*m*). Under the present Act, the disability of married women is removed, and there is no reason for attributing any incapacity in the matter of conversion (*n*).

Person can
only bind
his own
interest by
election.

2. No one can so elect as to bind any interests save his own and those of persons claiming through him. Thus, a remainderman cannot elect to take as money a fund directed to be laid out in land, against the wish of the tenant for life, who has a right to insist on having it laid out as directed (*o*). And in the same case it was laid down that even if a remainderman purported so to elect, he could not do so, so as to affect the rights of his real and personal

(*d*) *Robinson v. R.*, 19 Beav. 494.

(*e*) *Sharp v. St. Sauveur*, 7 Ch. 343.

(*f*) 45 & 46 Vict. c. 75.

(*g*) 3 & 4 Will. IV. c. 74.

(*h*) *Oldham v. Hughes*, 2 Atk. 453.

(*k*) *Forbes v. Adams*, 9 Sim. 462.

(*l*) *Briggs v. Chamberlain*, 11 Ha. 69; *Franks v. Bollans*, 2 Ch. 717.

(*m*) *Tuer v. Turner*, 20 Beav. 560.

(*n*) See *Weldon v. Neal*, W. N. 1884, p. 153.

(*o*) *Sisson v. Giles*, 3 De G. J. & S. 614. See and distinguish *Walrond v. Rosslyn*, 11 Ch. D. 640.

representatives in case of intestacy; and that, therefore, his heir would, notwithstanding his attempt, be entitled to the money. He may, of course, by deed or will dispose of his own interest in such a manner as he pleases (*p*).

A tenant-in-tail of money directed to be invested in land might as against his issue elect to take as money (*q*), but he could not prejudice the rights of remaindermen (*r*). Now, by the Fines and Recoveries Act (*s*), s. 71, money directed to be laid out in lands to be settled in tail is for the purposes of that Act to be treated as the lands to be purchased would be treated, and to be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to.

Tenant-in-tail.

The same principle applies when the property in question is bestowed on a number of persons in undivided shares. If election to take it in its original form can be made without prejudice to the others it is allowable; if not, it is not so. The application of this leads to the following distinction. If money is directed to be laid out in land and devised to a number of tenants in common, then any one or more may elect to take his or their shares as money; since this will in no way interfere with the others having the money laid out in land if they so choose (*t*). But if land is directed to be sold and the money divided equally, then it is not open to one of the co-legatees to elect to take his share as land; for to allow this would prejudice the sale, and so interfere with the rights of the others (*u*).

Person interested in undivided shares.
Election of one may not prejudice others.

A person contingently entitled to the proceeds of real estate directed to be sold may, pending the contingency, elect to take the estate as realty, and such election will become operative upon the contingency happening before or upon his death (*x*).

Person entitled contingently.

(*p*) *Lingen v. Sowray*, 1 P. Wms. 172.

(*q*) *Benson v. B.*, 1 P. Wms. 130.

(*r*) *Trafford v. Boehm*, 3 Atk. 440.

(*s*) 3 & 4 Will. IV. c. 74.

(*t*) *Seeley v. Jago*, 1 P. Wms. 389; *Walker v. Denne*, 2 Ves. jr. 182.

(*u*) *Deeth v. Hale*, 2 Mall. 317;

Holloway v. Radcliffe, 23 Beav. 163.

(*x*) *Meek v. Devenish*, 6 Ch. D. 566.

3. *How an election to reconvert may be effected.*

tention
pressed.

(1.) When there exists an election to reconvert, this may of course be effected by an express declaration of intention. A parol declaration has been often held sufficient (*y*), but was refused in *Bradish v. Gee* (*z*).

tention
plied from
anguage;

(2.) Election may be implied from language which does not amount to an express declaration; for instance, where a fund had been agreed to be laid out in land, a description thereof in a will as money amounted to an election to take it as personalty (*a*). Similarly a devise of land as such amounted to an election to take as land, notwithstanding that a sale had been directed (*b*).

om acts.

(3.) Election may be implied from the acts of the party entitled; and very slight circumstances will suffice (*c*).

ustrations.

Thus keeping land unsold for a long time raises a presumption of an election to take as land (*d*). Two years' retention was, however, considered insufficient (*e*). The granting of a lease and reserving a rent was held sufficient evidence of an intention to reconvert (*f*); and the same was the case where the *cestui que trust* of lands settled on trust for sale obtained possession of the title deeds, and retained them together with possession of the land until his death (*g*). Acts, however, which show an intention to reconvert lands directed to be sold, in which a person has an immediate interest, were held not applicable to lands devised by the same will, the direction to convert which was only to come into operation after a life interest still in existence. The intention to reconvert those in possession did not imply a similar intention as to others in remainder (*h*).

(*y*) *Edwards v. Warwick*, 2 P. Wms. 174; *Pulteney v. Darlington*, 1 Bro. C. C. 237; *Wheldale v. Part-ridge*, 8 Ves. 236.

(*z*) *Amb.* 229.

(*a*) *Pulteney v. Darlington*, *sup.*

(*b*) *Sharp v. St. Sauveur*, 7 Ch. 343.

(*c*) *Foxwell v. Lewis*, 30 Ch. D. 654.

(*d*) *Dixon v. Gayfere*, 17 Beav. 433; *Mutlow v. Bigg*, 1 Ch. D. 385; *Re Gordon*, 6 Ch. D. 531.

(*e*) *Kirkman v. Miles*, 13 Ves. 338.

(*f*) *Crabtree v. Bramble*, 3 Atk. 680.

(*g*) *Davies v. Ashford*, 15 Sim. 44.

(*h*) *Meredith v. Vick*, 23 Beav. 559.

When money directed to be laid out in land is received by the beneficiary from the trustees, it is deemed to be reconverted (*i*) ; but the receipt of the income for a long time was not considered sufficient (*k*). Where securities for moneys were assigned to trustees, to be invested in land to be settled upon a man and his wife with an ultimate limitation to the man's right heirs, and the husband died after some of the money had been laid out on other personal securities in trust for him, his executors, and administrators, there was held to be an election to take the money as personalty (*l*).

The mere neglect of trustees to perform their duty of effecting a conversion which is directed, will not affect the rights of others through the medium of the principle of reconversion. It falls rather within the doctrine of primary conversion, which rests, as we have seen, on the maxim that equity regards that done which ought to have been done (*m*).

(*i*) *Pulteney v. Darlington*, *sup.* ;
Rook v. Worth, 1 Ves. sr. 461.

(*k*) *Gillies v. Longlands*, 4 De G.
& Sm. 372 ; *Re Pedder's Settlement*,
5 De G. M. & G. 890.

(*l*) *Lingen v. Sowray*, 1 P. Wms.
172 ; *Cookson v. C.*, 12 Cl. & F. 121.

(*m*) *Lechmere v. E. of Carlisle*, 3
P. Wms. 215.

SATISFACTION.

SECTION III.—SATISFACTION AND PERFORMANCE.

SATISFACTION.

Definition.

- I. *Where the claim alleged to be satisfied arises from bounty.*
 1. *Satisfaction of legacies by portions (Ademption).*
Exp. Pye.
 2. *Satisfaction of portions by legacies.*
Hinchcliffe v. Hinchcliffe.
Thynne v. Earl of Glengall.
 3. *Repetition of legacies.*
Hooley v. Hatton.
- II. *Satisfaction of debts.*
 1. *By legacies.*
Talbot v. Shrewsbury.
Chancey's Case.
 2. *By portions.*

PERFORMANCE.

Contrasted with Satisfaction.

1. *By act of the party.*
Wilcocks v. Wilcocks.
Lechmere v. Earl of Carlisle.
 2. *By operation of law (Intestacy).*
Blandy v. Widmore.
-

definition.

In the construction of instruments equity often recognises a principle known as the doctrine of Satisfaction. It arises in cases where a donor, being already under some obligation to the donee, effects a donation under

circumstances which indicate an intention that this shall be taken in satisfaction of the prior obligation.

When this intention is expressed, no comment is required; for where the subsequent gift is expressly bestowed in extinguishment of the prior demand, the donee clearly cannot claim both (*p*). Intention expressed.

But in many cases this intention has to be implied from circumstances, and then considerable difficulty is often experienced. In dealing with them it will be convenient to distinguish between those cases in which the prior obligation arises from an act of bounty and those in which it is of the nature of a debt. Intention implied.
Division of subject.

In the former class fall the cases of the satisfaction of legacies by portions (commonly called ademption), and conversely the satisfaction of portions by legacies. From the similarity of the principles involved, we shall here also consider the case of the repetition of legacies in the same instrument, sometimes referred to as the satisfaction of legacies by legacies.

The latter head comprises the satisfaction of debts by legacies and by portions. After discussing this, we shall contrast it with the somewhat similar but distinctive doctrine of performance.

I. *Where the claim alleged to be satisfied arises from bounty.*

1. *The satisfaction of legacies by portions (Ademption).*

This subject was elaborately discussed and expounded in the leading case

EX PARTE PYE, EX PARTE DUBOST

[18 Ves. 140; 2 W. & T. L. C. 338],

where it was laid down as a general rule, that where a parent gives a legacy to a child, not stating the purpose

(*p*) *Hardingham v. Thomas*, 2 Drew, 353.

for which he gives it, he is understood to give a portion; and, since equity regards double portions with disfavour, if the parent afterwards advances a portion on the marriage of the child, the presumption arises that it was intended to be a satisfaction of the legacy, either wholly or in part.

Foundation of
the principle.
Leaning
against
double por-
tions.

(1.) From this case it is seen that the principle of ademption generally rests on the leaning of equity against double portions. The rule of presumption against double portions applies only as between a child and a parent, or person who has placed himself *in loco parentis*. It has been thus commented on by a learned judge: "A parent makes a certain provision for his children by will, if they attain twenty-one or marry, or require to be settled in life; he afterwards makes an advancement to a particular child. Looking at the ordinary dealings of mankind, the Court concludes that the parent does not, when he makes that advancement, intend the will to remain in full force, and that he has satisfied in his lifetime the obligation which he would otherwise have discharged at his death; and having come to that conclusion as the result of general experience, the Court acts upon it, and gives effect to the presumption that a double provision was not intended. If, on the other hand, there is no such relation either natural or artificial, the gift proceeds from the mere bounty of the testator, and there is no reason within the knowledge of the Court for cutting off anything which has in terms been given. The testator may give a certain sum by one instrument, and precisely the same sum by another; there is no reason why the Court should assign any limit to that bounty which is wholly arbitrary. The Court, as between strangers, treats several gifts as *primâ facie* cumulative" (q).

Relationship;
parent and
child gene-

With the exception hereafter to be noticed, then, a legacy is deemed to be satisfied by a portion only when

(q) *Suisse v. Lowther*, 2 Ha. 424, 435.

they are bestowed on a child by a parent or a person *in loco parentis* (r). The cases show that in this instance a mere natural relationship is not regarded, an illegitimate child being deemed at law a stranger to its father (s). The consequence is that an illegitimate child may happen to find itself better provided for than it would have been if legitimate.

(2.) It is often a matter of some difficulty to decide whether a person has placed himself *in loco parentis* to another or not. This depends on the intention of the person. The question is whether he meant to put himself in the situation of the lawful father of the child, as regards his office and duty to make provision for the child (t); and this question is of course one which must be decided according to the facts of each particular case. It is not possible to frame any precise formula by which to test the intention of the donor. It is at any rate not necessary that the person should in all respects adopt the child as his own, or that there should be any actual relationship between him and the child (u); and notwithstanding that the father of the child is living, if he does not maintain it (x), another person may be deemed to stand *in loco parentis* to it.

(3.) It appears that the only case in which a legacy not given by a parent or person *in loco parentis* will be adeemed by a subsequent portion, is where the legacy is expressed to be given for a particular purpose, and money is subsequently advanced for the same purpose (y), as where a testatrix bequeathed a sum to her niece adding the words "according to the wish of my late husband," and afterwards paid a similar sum to the niece, making a contemporaneous entry in her diary that such payment

rally essential.

Locus parentis, how determined.

Exception; legacy for express purpose.

Implied purpose not sufficient.

(r) *Booker v. Allen*, 2 R. & M. 270.

(s) *Exp. Pye*, 18 Ves. 152.

(t) *Exp. Pye*, *sup.*; *Powys v. Mansfield*, 6 Sm. 528; 3 My. & Cr. 359.

(u) *Roger v. South*, 2 Kee. 598.

(x) *Pym v. Lockyer*, 5 My. & Cr. 29; *Fowkes v. Pascoe*, 10 Ch. 350.

(y) *Debeze v. Mann*, 2 Bro. C. C. 165, 519; *Monek v. M.*, 1 Ball & B. 298, 303.

was a legacy from the niece's "uncle John" (z). But mere similarity of circumstances without expression of purpose does not suffice. Thus, where a person left a legacy of £200 to his wife to be paid within ten days after his decease, and afterwards at the request of his wife, within a few days of his death, gave her a cheque for £200, in order that she might have a sum at her immediate disposal on his death, there was held to be no ademption, there being no expression in the will as to the purpose of the legacy (a). *A fortiori* there will be no ademption where the purpose of the legacy does not correspond with that of the advancement (b), or the legacy and advancement are given upon different contingencies (c).

(4.) Dismissing, then, this exceptional case, and remembering that for our present purpose a person *in loco parentis* is to be regarded as equivalent to a parent, we have now only to consider the operation of the principle of ademption as applying to gifts between a parent and child.

Portion need
not be given
on marriage.

Advancements are naturally made and portions given most frequently in connexion with the marriages of children; but this is by no means necessary to bring into operation the leaning against double portions and the rule of ademption (d).

Presumption
not repelled
by slight
differences,

The presumption in favour of ademption is so strong that it will not be repelled by the fact that there are slight differences of circumstance between the legacy and the portion. Differences between them as to the times of payment will not suffice; thus where neither the legacy nor the portion was payable till after the testator's death, but the legacy was to vest in possession at the age of twenty-one years or marriage, while the provision by the settlement was payable within six months after the death, there

(z) *Pollock v. Worrall*, 28 Ch. D. 552.

(a) *Pankhurst v. Howell*, 6 Ch. 136.

(b) *Debeze v. Mann*, 2 Bro. C. C. 165, 519.

(c) *Spinks v. Robins*, 2 Atk. 491.

(d) *Leighton v. L.*, 18 Eq. 458; *Nevin v. Drysdale*, 4 Eq. 517.

was an ademption (*e*). And where a father covenanted to pay his son an annuity of £1000 a year and to charge the same on his real estate, and by his will he left the son personal property of greater value, there was an ademption notwithstanding that the will devised the real estate "subject to the charges thereon" (*f*).

Nor will a slight difference between the limitations of the will and those of the settlement suffice (*g*). In the case of *Durham v. Wharton* (*h*) ademption was held to have taken place notwithstanding very considerable differences between the gifts. There a life interest in £10,000 was given to a daughter by will, and after her decease to all her children as she should appoint. On her subsequent marriage, £15,000 was paid by the testator to her husband, he securing by settlement pin money and a jointure for his wife and portions for the younger children of the marriage. Still the legacy was held to have been adeemed (*i*). But as in most questions dependent on inferences of intention drawn from expressions and facts, the decisions are by no means easy to reconcile one with another (*k*).

Where after a legacy of a larger amount, a smaller sum is given by way of advancement or portion, the presumption is that it does not totally, but only *pro tanto*, adeem the legacy (*l*). It will presently be observed that this strongly distinguishes the principle of redemption from that of the satisfaction of a *debt* by a legacy.

It was formerly considered that a residuary bequest, being of an uncertain amount, was not susceptible of ademption (*m*); but it has now long been established that

or even considerable differences.

Ademption *pro tanto*.

By a residuary bequest.

(*e*) *Hartopp v. H.*, 17 Ves. 184.

(*f*) *Montague v. E. of Sandwich*, 32 Ch. D. 525.

(*g*) *Trimmer v. Bayne*, 7 Ves. 508.

(*h*) 3 Cl. & F. 146.

(*i*) See also *Montefiore v. Guedalla*, 1 De G. F. & J. 93; *Chichester v.*

Coventry, 2 L. R. H. L. 71, 92.

(*k*) See *Tussaud v. T.*, 9 Ch. D. 363.

(*l*) *Pym v. Lockyer*, 5 My. & Cr. 29; *Kirk v. Eddowes*, 3 Ha. 509.

(*m*) *Freemantle v. Bankes*, 5 Ves. 85.

such a bequest may be adeemed either totally or *pro tanto*, as the case may be (*n*).

Where there is but one child.

It seems that the doctrine of ademption does not rest *solely* on the ground that equity desires to secure equality between children, and for this reason discountenances double portions, as unduly favouring one; inasmuch as it is applicable even in cases where the testator leaves only one child (*o*). Where part of a *residuary* bequest to children and a stranger is adeemed by an advance to one of the children, the stranger will not be suffered to gain by the ademption, the adeemed part being divisible amongst the children only (*p*). *Secus*, however, where a pecuniary legacy is adeemed (*q*).

Limits of the principle.

(5.) The following cases will indicate the limits of the application of the principle of ademption; and they serve well to show that ademption depends upon the presumed intention of the testator.

No ademption by occasional gifts,

A legacy by a parent is not adeemed even *pro tanto* by occasional gifts made subsequently in the testator's lifetime; nor will the Court take an account of small sums so given, to show that they were intended as a portion (*r*).

nor by a payment made before the will,

There is no presumption of law that the payment of a sum of money to a child previous to the making of the will shall operate as an ademption of a legacy therein contained (*s*). But if a legacy has been once adeemed by a subsequent advance, it will not be re-established by a codicil made after it which purports to confirm the will and all the bequests therein (*t*).

nor where the gifts differ in

There will be no ademption where the gifts in question are of different characters, or are expressed to be given for

(*n*) *Scholefield v. Heap*, 27 Beav. 93; *Montefiore v. Guedalla*, 1 De G. F. & J. 93; *Vickers v. V.*, 37 Ch. D. 526.

(*o*) *Twining v. Powell*, 2 Coll. 262; and see 1 De G. F. & J. 103.

(*p*) *Meinertzhagen v. Walters*, 7 Ch. 670.

(*q*) *Kirk v. Eddowes*, 3 Ha. 509.

(*r*) *Watson v. W.*, 33 Beav. 574; *Re Peacock*, 14 Eq. 236; *Ravenscroft v. Jones*, 32 Beav. 669; 4 De G. J. & S. 224.

(*s*) *Taylor v. Cartwright*, 14 Eq. 167, 176.

(*t*) *Powys v. Mansfield*, 3 My. & Cr. 359, 376.

different purposes. Thus a legacy was held to be not adeemed by the grant of an annuity (*u*), or by an advancement which depended upon a contingency (*x*), and a legacy of £500 was not adeemed by a subsequent gift of a part of the testator's stock-in-trade (*y*): but an admission of a son to a share of partnership capital has more recently been held to effect an ademption (*z*).

2. *The satisfaction of portions by legacies.*

In the above cases, the question was whether a gift having been made by will was satisfied by a subsequent advancement made or portion given *inter vivos*. We now come to the converse question, whether a portion having been contracted to be given is satisfied by a subsequent legacy.

One of the leading authorities on this branch of the subject is

HINCHCLIFFE v. HINCHCLIFFE

[3 Ves. 516],

from which we learn that most of the rules which we have seen to be applicable in cases of ademption are of equal authority here. Thus here also the foundation of the doctrine is the distaste with which equity regards double portions; and consequently this species of satisfaction, as well as ademption, is, *prima facie* applicable only as between children and a parent or person *in loco parentis*. From the same case, also, we observe that slight circumstances of difference will not suffice to prevent the operation of the usual presumption.

The similarity between the two classes of cases is further seen from the important case of

THYNNE v. EARL OF GLENGALL

[2 H. L. 131],

in which a residuary bequest was held to be a satisfaction

(*u*) *Watson v. W.*, *sup.*

(*x*) *Spinks v. Robins*, 2 Atk. 493.

(*y*) *Holmes v. H.*, 1 Bro. C. C. 555.

(*z*) *Larves v. L.*, 20 Ch. D. 81;

Vickers v. V., *sup.*; *Bengough v.*

Walker, 15 Ves. 597.

of a covenant to bestow a certain portion on a daughter, notwithstanding some important differences in the limitations.

Presumption
more easily
rebutted than
in ademption.

It does, however, seem that in these cases, where the settlement precedes the will, the presumption against double portions will be more easily rebutted than where the will precedes the settlement. Thus in a well-known case it has been said :—"The rule against double portions "is but a rule of presumption, and there is much less "difficulty in supposing that it was not intended to pre- "vail where the person to whose dispositions it is to be "applied had not the power to enforce it without the con- "sent of others, than in a case where the whole was under "his absolute control. When the will precedes the settle- "ment, it is only necessary to read the settlement as if the "person making the provision had said, 'I mean this to be "in lieu of what I have given by my will.' But if the "settlement precedes the will, the testator must be under- "stood as saying, 'I give this in lieu of what I am already "bound to give, if those to whom I am so bound will "accept it.' It requires much less to rebut the latter pre- "sumption than the former" (a).

Principle
resembles
ademption,

These expressions indicate the principal difference between these cases of the satisfaction of a portion by a legacy, and the ademption of a legacy by a portion. Where the settlement comes first, the persons entitled under it are purchasers, and no presumed intention of the testator can deprive them of their rights thus acquired. At least, they have a right to elect between the benefit which by the settlement is already theirs, and that conferred by the will. If the beneficiary elects to take under the will, then, unless something rebuts the presumption against double portions, the settlement is superseded, and is not to be performed at all. If he elects to claim his rights under the settlement, then, in the same circum-

(a) *Per Lord Cranworth, in Chichester v. Coventry*, 2 L. R. H. L. 71.

stances, he must to that extent give up his rights under the will to compensate those whom his election dis-appoints (b).

It might, perhaps, be supposed that the recipient of a portion under a settlement being a purchaser, this species of satisfaction would be more analogous to the satisfaction of a debt by a legacy than to the ademption of a legacy by a portion. This, however, is not the case. For though a portion is in its legal aspect a debt, equity still regards it as a benefit conferred; and thus it falls within the presumption against double portions, which has, of course, no application in the case of an ordinary debt. The consequence is, that the leaning of equity is strongly in favour of the satisfaction of a portion by a legacy; while, as we shall presently observe, it is equally decided against the satisfaction of a debt by a legacy. This distinction is in itself abundantly sufficient to bring the cases we are now considering nearer to the doctrine of ademption than to that of satisfaction, as applied to ordinary debts.

A provision made by a will may satisfy one part of a covenant without satisfying the whole. Thus, if the covenant gives a life interest to a daughter, with remainder to children, a legacy to the daughter may satisfy her life interest, but cannot satisfy the claim of the children (c). And similarly, there may be a satisfaction to the children's portion, not touching that of the parent (d).

Where a settlement contained a declaration that an advancement by the parent in his lifetime should be considered as satisfaction of a portion covenanted to be bestowed, a legacy given by will was considered not to be equivalent to an advancement in the lifetime so as to come within the declaration; and there was held to be no satisfaction (e).

(b) *Chichester v. Coventry*, *sup.*; *M'Carogher v. Whieldon*, 3 Eq. 236.

(c) *Bethell v. Abraham*, 3 Ch. D. 590.

(d) *Chichester v. Coventry*, 2 L. R. H. L. 71, 92; *Mayd v. Field*, 3 Ch. D. 587.

(e) *Cooper v. C.*, 8 Ch. 813.

Save as here excepted, it may be generally understood that the limitations and conditions of the principle above stated as applicable to ademption, are applicable also in the case of satisfaction of a portion by a legacy (*f*).

Rules as to
extrinsic
evidence.

There has been a great deal of learned argument touching the admissibility of extrinsic evidence (that is, evidence of facts not contained in the instruments themselves) in order to decide for or against the application of the doctrine of satisfaction; but the results of the cases are reducible to a few simple principles.

1. Not admitted to vary
written
instruments.

(1.) Parol evidence of extrinsic circumstances is not admitted to alter, add to, or vary a written instrument, or to prove with what intention it was executed. In *Hall v. Hill* (*g*) the question was whether a portion had been satisfied by a legacy. It was clear that in the absence of extrinsic evidence of the testator's intention when he made his will there would be no satisfaction. Evidence was tendered which clearly showed that the testator in fact intended the legacy to satisfy the portion. The evidence was rejected on the ground that it had nothing to do with the debt, but applied to the will only, and, in fact, amounted to the insertion in the will of a declaration which was not there.

2. Admitted
to rebut pre-
sumption of
law.

(2.) But where the law presumes a certain intention from collateral circumstances, such as a certain relationship between the parties, then extrinsic evidence is admissible to rebut this presumption. It was said in *Kirk v. Eddowes* (*h*), that where "the law raises a presumption
" that the second instrument was an ademption of the gift
" by the instrument of earlier date, evidence may be gone
" into to show that such presumption is not in accordance
" with the intention of the author of the gift " (*i*).

(*f*) *Bellasis v. Uthwatt*, 1 Atk. 427; *Lethbridge v. Thurlow*, 15 Beav. 334; *Sparkes v. Cator*, 3 Ves. 530.

(*g*) 1 D. & War. 94.

(*h*) 3 Ha. 509.

(*i*) See, also, *Debcze v. Mann*, 2 Bro. C. C. 165, 519.

(3.) Where evidence is admissible to rebut such presumption, counter-evidence is admissible (*k*).

3. When so admitted, counter-evidence admissible.

In *Kirk v. Eddowes* (*l*) the question was whether a legacy was *pro tanto* adeemed by a subsequent gift of a promissory note made without any writing. Evidence was tendered which related to this gift, not to the written instrument; and it was held that evidence of such a nature being admissible to rebut the presumption of law, counter-evidence was admissible in support of the presumption (*m*).

3. Repetition of legacies.

In many respects similar to the ademption of legacies by portions, and the satisfaction of portions by legacies, are the cases which arise when two legacies are given by the same will, or by a will and codicil, and it is doubtful whether the second legacy is intended to be additional to the first, or to be merely a repetition.

Repetition of legacies.

The case most usually referred to on this subject is

HOOLEY v. HATTON

[1 Bro. C. C. 390, n.; 2 W. & T. L. C. 321].

In this case Lady Finch gave to Lydia Hooley, the plaintiff, £500 by her will. She made a codicil in these words: "I add this codicil to my will: I give Lydia 'Hooley £1000.'" The plaintiff filed a bill claiming these legacies, and the question was whether she was entitled to them both, or only to the £1000. There being no internal evidence touching the question, it was decided on the general rule of law that the legacies were cumulative, and the plaintiff was declared entitled to them both.

The judgment of Aston, J., in this case classified double legacies under four heads: (1) where the same specific thing is given twice; (2) where the like quantity is given twice; (3) where a greater sum is given first, and a less

Classification in *Hooley v. Hatton*.

(*k*) See, also, *Debeze v. Mann*, *sup.* (*m*) See *Palmer v. Newell*, 20 Beav. 32, 39.

(*l*) *Supra*.

sum afterwards; (4) where a smaller sum is given first, and a greater sum afterwards.

Specific
legacy.

The first case presents no difficulty, since where the same specific thing or *corpus* is twice expressed to be given, whether in the same or in different instruments, it must clearly be regarded as a repetition (*n*).

Legacies of
quantity.

The remaining three classes may be most conveniently considered together, distinguishing, however, those cases in which the two gifts are contained in the same instrument from those in which they are given by two instruments.

1. In same
instrument.

(1.) Where two pecuniary legacies are given by the same instrument.

If equal,
repetition.

The general rule is that when two legacies of the same amount are given by the same instrument there will be considered to be a repetition, and one only will be good (*o*). And the same rule applies to annuities (*p*).

If unequal,
not so.

But where the two legacies are of unequal amount, whether the greater precedes the less, or the less the greater, they are *primâ facie* cumulative (*q*).

(2.) Where two pecuniary legacies are given by different instruments.

In different
instruments.

The rules regulating these cases cannot be so simply stated.

Primâ facie
cumulative.

Primâ facie, if the legacies are given *simpliciter*, no motive for the gift being expressed, they are regarded as cumulative; and it is immaterial whether they are of equal or unequal amount (*r*). *A fortiori* they will be cumulative when there is any difference in their nature or time of payment (*s*), or they are given upon or for different trusts or purposes (*t*).

(*n*) *D. of St. Albans v. Beaucherk*, 2 Atk. 636; *Suisse v. Lowther*, 2 Ha. 432.

(*o*) *Garth v. Meyrick*, 1 Bro. C. C. 30.

(*p*) *Holford v. Wood*, 4 Ves. 76.

(*q*) *Windham v. W.*, Rep. t. Finch, 267; *Hartley v. Ostler*, 22 Beav. 449.

(*r*) *Roch v. Callen*, 6 Ha. 531; *Russell v. Dickson*, 4 H. L. 293; *Wilson v. O'Leary*, 12 Eq. 525; 7 Ch. 448.

(*s*) *Hodges v. Peacock*, 3 Ves. 735; *Masters v. M.*, 1 P. Wms. 421.

(*t*) *Saurey v. Runney*, 5 De G. & S. 698; *Spire v. Smith*, 1 Beav. 419.

If, however, the same motive is expressed for both gifts, and the same sum is given, then, though the gifts are contained in two instruments, there will be deemed to be a repetition, and only one will be payable (*u*). If equal and on same motive, repetition.

But if the same sums are given and different motives are expressed (*x*), or if the same motive is expressed and different sums are given (*y*), then the two gifts will be considered cumulative. Not otherwise.

(3.) Such are the general rules, but they are subject to modification according to the evidence which may be forthcoming as to the testator's intention.

As to intrinsic evidence there is no difficulty; it is always available to explain the intention. Thus the fact that the second instrument expressly refers to the first, or seems to be merely a copy of it, may, even where the sums given are unequal, lead to the conclusion that the second was intended to substitute, and not to be added to, the first (*z*). And similarly, where two precisely similar codicils were executed at the same time, it was considered that the intention was to execute them in duplicate, and not to give double legacies (*a*). And the same conclusion was reached where two precisely similar instruments were executed, though at different times (*b*). Intrinsic evidence.

The rules as to extrinsic evidence are similar to those above stated as ordinarily applicable in a case of satisfaction or ademption. Where the Court raises the presumption against double legacies (*e.g.*, where two equal legacies are given by one instrument, or in different instruments with the same motive expressed), then such evidence is admissible to show that the testator intended both to be paid. Extrinsic evidence.

But where the Court does not raise this presumption

(*u*) *Hurst v. Beach*, 5 Madd. 351, 358; *Roch v. Callen*, *sup.*

(*x*) *Ridges v. Morrison*, 1 Bro. C. C. 388.

(*y*) *Hurst v. Beach*, *sup.*

(*z*) *Martin v. Drinkwater*, 2 Beav. 215; *Coote v. Boyd*, 2 Bro. C. C. 521.

(*a*) *Whyte v. W.*, 17 Eq. 50.

(*b*) *Hubbard v. Alexander*, 3 Ch. D. 738.

(*e.g.*, where legacies of different amounts are given by the same will, or legacies of the same amount *simpliciter* by different instruments), then extrinsic evidence is not admissible to show that the testator intended only the latter to be paid (*c*).

In short, extrinsic evidence is admissible in favour of, but not against, a legatee claiming the legacies as cumulative.

Substituted
legacy subject
to condition
of first.

As a general rule, where one legacy is given merely in substitution for another, it will, in the absence of any expression of a contrary intention on the part of the testator, be liable to the same incidents as the legacy for which it is substituted (*d*); but this is, of course, not so where the second legacy is a distinct and substantive bequest (*e*). An additional legacy, though not so expressed, will in general be held subject to the same incidents and conditions as the first legacy. Thus if a legacy be given by will to a married woman to her separate use, an additional legacy given by the codicil will also be held for her separate use (*f*). In no case, however, has it been held that the latter gift is to go to the parties entitled under the subsequent limitations of the former gift (*g*).

II. *Where the Claim alleged to be satisfied is of a Legal Nature.*

1. *Satisfaction of debts by legacies.*

The leading authority on this branch of the subject is

TALBOT v. THE DUKE OF SHREWSBURY

[Prec. Ch. 394 ; 2 W. & T. L. C. 352],

where the principle is laid down that if a debtor, without

(*e*) *Hurst v. Beach*, 5 Mad. 351 ;

Guy v. Sharp, 1 My. & K. 589.

(*d*) *Cooper v. Day*, 3 Mer. 154.

(*e*) *Chatteris v. Young*, 2 Russ. 183.

(*f*) *Day v. Croft*, 4 Beav. 561.

(*g*) *Mann v. Fuller*, Kay, 624.

taking notice of the debt, bequeaths a sum as great as, or greater than the debt, to his creditor, this is to be deemed a satisfaction of the debt; but that a legacy of less amount than the debt is not regarded as a satisfaction *pro tanto*, nor will a contingent legacy ever operate as a satisfaction.

These cases rest, as do all cases of satisfaction, on the presumed intention of the donor, and they illustrate the maxim, *Debitor non presumitur donare*. But the reasoning upon which the principle here rests has been often pronounced to be artificial and unsatisfactory, and the inclination of the Court is decidedly against its application, so that slight circumstances will be laid hold of to rebut the presumption.

Satisfaction depends on presumed intention. Slight circumstances rebut the presumption.

That this is so is well shown by

CHANCEY'S CASE

[1 P. Wms. 408 ; 2 W. & T. L. C. 353],

in which a testator being indebted to his servant for wages, had given her a bond for £100 as due on that account, and afterwards by his will gave her £500 for her long and faithful services, and directed that all his debts and legacies should be paid. This last direction was considered sufficient to rebut the presumption of satisfaction, and the servant was held entitled to be paid both the bond and the legacy in full.

(1.) An examination of the cases will show that the principle of satisfaction as applied to debts is subject to many limitations. In the following cases the presumption of satisfaction has been held to be rebutted by the nature of the legacy:—

Presumption rebutted by the nature of the legacy.

(i.) Where the legacy is of less amount than the debt. In such cases there is no satisfaction, even *pro tanto* (*h*).

Where legacy is less than debt,

(ii.) Where the legacy is given upon a contingency (*i*).

or legacy is contingent,

(*h*) *Talbot v. Shrewsbury, sup.*

(*i*) *Ibid.* ; *Crompton v. Sale*, 2 P. Wms. 553.

or uncertain,
such as
residue.

(iii.) Where the legacy is of an uncertain or fluctuating amount; such as a gift of the whole or part of the testator's residue. Such a legacy will not operate as satisfaction, even though in the event it may happen to equal or exceed the amount of the debt (*k*).

Where the
time of pay-
ment differs,

(iv.) Where the time fixed for payment of the legacy is different from that at which the debt is due, so as to be not equally advantageous to the creditor, there will be no satisfaction (*l*): in this case the debt being due at the death, the legacy was directed to be paid one month after the death. Where the legacy has been payable before the debt has become due, it has been held to operate as satisfaction (*m*).

or the charac-
ter of the
gift differs.

(v.) There will be no satisfaction where the testamentary gift differs from the gift in character. Thus a gift of land will not satisfy a pecuniary debt (*n*); a legacy will not satisfy an annuity (*o*); nor will an absolute gift satisfy a debt held on trust for the donee for life with remainder to his children (*p*).

Presumption
rebutted by
the nature of
the debt.

(2.) Sometimes the presumption of satisfaction is rebutted by the nature of the debt: Thus:—

Where debt is
contingent or
uncertain,

(i.) A contingent or uncertain debt, such as a debt upon an open account, cannot be satisfied by a legacy (*q*). But the mere fact that a debt is under certain circumstances liable to be varied in amount will not always prevent the presumption of satisfaction. Thus, there was held to be satisfaction where a sum of money had been deposited with the testator, against which the creditor had drawn on him from time to time (*r*).

or is con-
tracted sub-
sequently to
the will.

(ii.) A debt contracted subsequently to the making of the will cannot be satisfied by a legacy conferred by the

(*k*) *Devese v. Pontet*, 1 Cox, 188;
Thynne v. E. of Glengall, 2 H. L.
154.

(*l*) *Clark v. Sewell*, 3 Atk. 96.

(*m*) *Wathen v. Smith*, 4 Mad. 325.

(*n*) *Eastwood v. Vinke*, 2 P. Wms.
614.

(*o*) *Cole v. Willard*, 25 Beav. 568.

(*p*) *Fairer v. Park*, 3 Ch. D. 309.

(*q*) *Rawlins v. Powell*, 1 P. Wms.

297.

(*r*) *Edmunds v. Low*, 3 K. & J.

318.

will, since in such a case no intention to satisfy the debt can be reasonably presumed (s).

(3.) In other cases it is gathered from expressions in the will that satisfaction was not intended. Thus:—

(i.) The fact that the testator has assigned a particular motive for the gift has been considered to rebut the presumption (t).

(ii.) In *Chancey's Case* (u) an express direction for the payment of debts and legacies was taken as an indication that the testator intended both the debt and legacy to be paid (x). A direction to pay debts alone has been considered not to have the same effect (y); though it is undoubtedly of great weight in that direction when taken in connexion with other circumstances tending to rebut the presumption (z).

The relationship of parent and child or husband and wife does not, it seems, affect the principle regulating these cases of satisfaction. Where there is an actual debt due to the child, as distinguished from a portion, it will only be satisfied by a legacy of equal or greater amount, and, as in other cases, the presumption will be easily rebutted (a).

2. Satisfaction of debts by portions.

Analogous to the above instances of satisfaction, and subject to similar rules, is the case in which a father, being indebted to a child, makes an advance to him in his lifetime. The portion so advanced will *primâ facie* effect a satisfaction if it equals or exceeds the amount of the debt (b).

It is a common and well-known principle that extrinsic

Presumption rebutted by expressions in the will.

Where a particular motive is expressed, or there is a direction for payment of debts and legacies.

Relationship of parent and child immaterial.

Satisfaction of debt by portion.

Quære whether

(s) *Cranmer's Case*, 2 Salk. 508.

(t) *Mathews v. M.*, 2 Ves. sr. 635; *Charlton v. West*, 30 Beav. 124.

(u) *Sup.*, p. 487.

(x) *Richardson v. Greese*, 3 Atk.

65.

(y) *Edmunds v. Low*, *sup.*

(z) *Rowe v. R.*, 2 De G. & S. 297; *Pinchin v. Simms*, 30 Beav. 119.

(a) *Tolson v. Collins*, 4 Ves. 483; *Fowler v. F.*, 3 P. Wms. 353; *Atkinson v. Littlewood*, 18 Eq. 595.

(b) *Wood v. Briant*, 2 Atk. 521; *Plunkett v. Lewis*, 3 Ha. 316; *Lawes v. L.*, 20 Ch. D. 81.

extrinsic
evidence
admissible.

evidence is admissible to rebut a presumption of law (*c*), and on this principle extrinsic evidence should be admissible when the presumption arises that a debt is satisfied by a legacy to rebut this presumption (*d*). But such evidence has nevertheless been sometimes refused (*e*).

PERFORMANCE.

The equitable doctrine of *Performance* has some points of resemblance to, but yet must be carefully distinguished from, that of *Satisfaction*, as applied to the cases we have been considering.

Distinction
between satis-
faction and
performance.

Satisfaction, as we have seen, wholly rests upon an implied intention of the testator; and several rules of presumption have been adopted which do not apply to cases of performance. The presumption will not hold if the gift is less beneficial in any way than the debt. There is no such thing as satisfaction *pro tanto*.

Performance
rests on the
ground of
natural
justice.

The doctrine of performance rather arises from a construction which equity, in its regard for natural justice, puts upon certain circumstances, than from the implied intention of the party. "*Equity imputes an intention to fulfil an obligation.*" It is not, therefore, subject to any of those rules which originate in the design of correctly ascertaining a testator's intention. And it conspicuously differs from satisfaction as applied to debts, in that performance is commonly deemed to have been effected *pro tanto*.

Performance
may be im-
puted from
the acts of the
covenantor.

1. The typical case of performance is where a person covenants to do a certain act, and this covenant is deemed to be performed by some subsequent act which wholly or approximately effects the same purpose, though it does not expressly refer or precisely conform to the covenant.

(*c*) *Kirk v. Eddowes*, 3 Ha. 509;
Hall v. Hill, 1 D. & W. 94.

Wallace v. Pomfret, 11 Ves. 542.

(*e*) *Fowler v. F.*, 3 P. Wms. 353;

(*d*) *Plunkett v. Lewis*, 3 Ha. 316; *Hall v. Hill*, *sup.*

One of the most familiar cases on this point is

WILCOCKS v. WILCOCKS

[2 Vern. 558; 2 W. & T. L. C. 389].

There a person covenanted on his marriage to purchase lands of the value of £200 a year, and to settle them for the jointure of his wife and to the first and other sons of the marriage in tail. He purchased lands of that value, but made no settlement, so that on his death the lands descended to his eldest son. The eldest son filed a bill for a specific performance of the covenant; but it was held that the lands descended should be deemed a performance of the covenant.

Another similar case which further illustrates the doctrine is

LECHMERE v. EARL OF CARLISLE

[3 P. Wms. 227; Ca. t. Talb. 88].

Here Lord Lechmere on his marriage covenanted to lay out within one year of the marriage £6,000 (his wife's portion) and £24,000, amounting in all to £30,000, in the purchase of freehold lands in possession in the south part of Great Britain, with the consent of the Earl of Carlisle and Lord Morpeth, to be settled on Lord Lechmere for life, remainder for so much as would amount to £800 a year to Lady Lechmere for her jointure, remainder to first and other sons in tail male, remainder to Lord Lechmere, his heirs and assigns for ever. Lord Lechmere was seised of some lands in fee at the time of his marriage, and after his marriage purchased some estates in fee of about £500 a year, some estates for lives, and some reversionary estates in fee expectant on lives; and he contracted for the purchase of some estates in fee in possession. None of these purchases or contracts were effected with the consent of the trustees, there was no settlement made of any of the lands, and shortly afterwards Lord

Lechmere died intestate. Thereupon a bill was filed by his heir for a specific performance of the covenant, and to have the £30,000 laid out in accordance therewith out of the personal estate. It was held by Lord Talbot, on appeal, reversing the decision of Sir J. Jekyll, M. R., that the freehold lands purchased, and contracted to be purchased, in fee simple in possession after the covenant ought to be considered as purchased in part performance of the covenant. The heir was therefore only entitled to a decree for the laying out of so much money as, together with the sum already so laid out and contracted to be laid out, would amount to £30,000.

Conclusions
from the
cases.

It will be observed that the lands possessed by the covenantor before the covenant, and lands purchased afterwards, but of a different nature from what was covenanted to be purchased, were not included in the performance; and further, that the consent of the trustees was deemed not to be an essential.

The doctrine has also been applied to a case in which the covenant was to pay money to trustees to be laid out by them in a purchase of land, and the covenantor himself purchase the land, and died intestate without having effected a settlement (*f*).

The same principle is applicable where the obligation arises from an Act of Parliament instead of from a covenant (*g*).

Purchase by
trustees
stands on
higher
ground.

Where trustees having trust money in their hands are under an obligation to lay it out in lands, any purchase by them will more readily than in other cases be deemed a performance of their obligation (*h*); though such cases usually fall under the still stronger rule that a *cestui que trust* is entitled to follow trust money if traceable, however it may have been converted (*i*).

(*f*) *Sowden v. S.*, 1 Bro. C. C. 582.

(*g*) *Tubbs v. Broadwood*, 2 R. & M. 487.

(*h*) *Mathias v. M.*, 3 Sm. & G. 552.

(*i*) *Taylor v. Plumer*, 3 M. & S. 562; *Lench v. L.*, 10 Ves. 511.

2. Another illustration of the doctrine of performance is where a person covenants to do an act and the covenant is in effect wholly or partially performed by the operation of law.

Performance may result from the operation of law.

On this the leading authority is

BLANDY v. WIDMORE

[1 P. Wms. 323; 2 W. & T. L. C. 391].

There a man covenanted, previous to his marriage, to leave to his wife £620. He married, and died intestate, his wife's share under the intestacy being more than £620. The covenant was hereby deemed to be performed, so that the widow could not claim her share under the intestacy and £620 over and above as a debt under the covenant.

In this case the covenant was wholly satisfied, but it is equally clear that if the distributive share had been less than the sum covenanted to be paid it would be considered a performance *pro tanto* (j). The same principle has, moreover, been applied where the covenant has been that the executors should pay a sum of money, or that the money should be paid to trustees for the wife (k).

There are, however, three classes of cases which must be carefully distinguished from those which fall under this principle.

(1.) Where the covenantor has made a will, and thereby conferred a gift either by way of general legacy or as a residue, such a gift will not generally be deemed a *performance* of a covenant to leave a certain sum (l). It depends on the circumstances above considered whether it would operate as a *satisfaction* (m).

A general legacy or gift of residue is not generally performance.

(2.) Where the covenant is not to pay a gross sum, but to give a life annuity, or the interest of a sum of money

Share in intestacy not performance

(j) *Gartshore v. Chalie*, 10 Ves. 14, 16.

(k) *Lee v. D'Aranda*, 3 Atk. 419.

(l) *Haynes v. Mico*, 1 Bro. C. C. 129; *Devese v. Pontet*, 1 Cox, 188.

(m) *Sup.*, p. 486.

of covenant
for annuity.

Performance
does not
apply to a
debt due in
testator's
lifetime.

for life, such a covenant will not be performed by the devolution of a share under an intestacy (n).

(3.) Where the covenant is to pay a sum in the covenantor's lifetime, and there is a breach of the covenant before the death, then the devolution of a share in intestacy will not amount to a performance (o). Here the covenant having been to pay the settlor's wife a sum of money two years after marriage, and not having been complied with, there was an actual debt due when the intestate died, between which and her claim as widow in the intestacy, the covenantee could not be put to her election.

(n) *Couch v. Stratton*, 4 Ves. 391.

(o) *Oliver v. Brickland*, 1 Ves. sr. 1; cited 3 Atk. 420.

PART II.

WHERE THE JURISDICTION RESTS ON THE DISTINCTIVE PROCEDURE OF EQUITY.

INTRODUCTION.

It has been already pointed out, and cannot be too strongly urged, that it is impossible to draw any strictly defined line between those matters in which the jurisdiction of equity has arisen from the distinctive character of its principles, and those in which it is to be ascribed to the superiority or peculiarity of its procedure.

In many of the subjects which have been treated in the preceding part, it has been necessary to anticipate much that would appropriately present itself now for consideration, but which could not, without serious inconvenience, have been severed from the connexion in which it there stands. For instance, the subject of mortgages could not be examined without investigation of the method of accounting between mortgagor and mortgagee: no more was it possible to take a comprehensive view of the doctrine of trusts without trespassing on many questions which most usually present themselves in the course of the administration of assets.

On the other hand, in those matters in which the jurisdiction of equity is essentially administrative, or is otherwise due to its peculiar procedure, it of course recognises and applies as occasion requires all the principles already expounded. Thus, actions arising out of partnerships

and in respect of public companies continually raise questions of trust and of fraud ; and, as has been observed, the jurisdiction to relieve against the consequences of mistake is nowhere more frequently concerned than in actions for specific performance.

As it was necessary in introducing the first part of the work to inquire generally what the substantive principles were which distinguished equity from law, so it behoves us now to make a corresponding inquiry as to the distinctive Procedure of Courts of equity. This must necessarily be here treated in a very general way, for otherwise we should be involved in an exposition of Chancery practice, which is beyond the province of this work.

Account.

Procedure at
common law.

Inapplicable
to long
accounts.

Action of ac-
count at law.

Restrictions
as to parties.

Perhaps the most extensively useful of the features of equitable procedure is the facility which it affords for the taking and adjusting of accounts. In actions at law, it was, under the old practice, necessary that the plaintiff should estimate his claim in a definite sum of money. Supposing the claim to be good in law, it was for the jury to determine on the facts whether the demand was reasonable or excessive in amount, and to give their verdict accordingly. Of course, it was open to the defendant to adduce evidence generally and particularly to show that the plaintiff's claim ought to be reduced ; and simple cases of account might well be considered and adjusted by the jury. But it is evident that many cases arise in which the determination of what is justly due to a plaintiff necessarily involves long and difficult inquiries—for instance, it may be necessary to review a series of transactions extending over many years. For such an investigation a jury is clearly incompetent.

This difficulty was very long ago recognised, and a remedy for it attempted apart from the assistance of equity. Indeed, one of the most ancient actions at law was the action of account. But the inadequacy of the remedy thus afforded is sufficiently shown by mentioning only a few of the conditions attached to it. Thus, the action of account

originally lay only where there was either privity in deed by the consent of the party, as against a bailiff or receiver appointed by the party; or a privity in law, as against a guardian in socage. By the law merchant it was so far extended that a merchant might have an account against another, charging him as a receiver. Beyond these limits the action did not apply, until by successive statutes it was further extended to the executors of merchants, to administrators, and finally, so as to lie against executors and administrators of guardians, bailiffs, and receivers (*a*).

Nor were these restrictions as to the parties the only disadvantages. Even when the action was sustainable, the procedure under it was cumbrous in the extreme. The auditors appointed to take the account could not until 4 & 5 Anne, c. 16, examine the parties before them on oath. Whenever a disputed item was in question the parties might join issue thereon or demur and bring their dispute before the Court, and thus the inquiry might be almost interminably protracted. Moreover, no equitable claims, such as those arising from trusts, liens, frauds, &c., were recognised; so that after all the discussion at law, a suit in equity might still have been requisite to determine the full rights of the case (*b*).

Defects as to
procedure.

It is not surprising that the legal action of account should under these circumstances have fallen into desuetude, and have been displaced by the remedy in equity to which its imperfections gave birth. We shall presently consider in greater detail some of the leading principles by which Courts of equity have been guided in the taking of accounts. It suffices now to illustrate the superiority of the equitable over the legal remedy, by stating that the master who acted as auditor in equity (now represented by the chief clerk) had abundant power to examine the parties on oath, to make inquiries from all proper parties by

Displaced by
the equitable
remedy.

Superiority
illustrated.

(*a*) 4 & 5 Anne, c. 16; Story, 445. (*b*) Story, 448—9.

testimony on oath, and to require the production of all necessary documents; and that his decision was open to be re-examined by the Court whether in point of fact or of law, by a simple and expeditious process (c).

Extent of the jurisdiction in equity.

The legal action of account having become obsolete, the jurisdiction of equity in all matters of complication was fully established, and, as usual, being once established, it was in no way interfered with by the fact that new powers were subsequently conferred on Courts of law; for instance, the power to compel a reference to arbitration under the Common Law Procedure Act, 1854 (d). The general test as to whether Courts of equity had jurisdiction in any particular case seems to have been the question whether or not the account could be competently examined upon a trial at *nisi prius* (e).

Fiduciary relations give jurisdiction.

In some cases it was necessary for the parties to resort to equity because of the existence of some fiduciary relation between them which prevented the application of a legal remedy. Thus a principal desiring an account against his agent could only obtain adequate relief in equity, since equity alone could enforce the discovery necessary to ascertain the facts of the case (f); in short, wherever the relation of trustee and *cestui que trust* exists the matter naturally falls under the jurisdiction of equity (g). An agent, however, could not sue in equity for an account against his principal, since no confidence is reposed by the agent, and the same ground of jurisdiction did not therefore exist (h).

Account incident to injunction.

In many cases, again, the remedy of account is incident to and accompanies that of injunction—for instance, in suits for the infringement of patents of copyright, and in

(c) See Ord. LV. rr. 15 *et seq.*
 (d) 17 & 18 Vict. c. 125, s. 3.
 (e) *O'Connor v. Spaight*, 1 S. & L. 305; *Taff Vale Co. v. Nixon*, 1 H. L. 111.

(f) *Mackenzie v. Johnston*, 4 Mad. 373.
 (g) *Docker v. Somes*, 2 My. & K. 664.
 (h) *Padwick v. Stanley*, 9 Ha. 627.

respect of waste. These cases are more particularly referred to under the head of Injunction.

Since the Judicature Acts, questions as to *jurisdiction* can, of course, no longer arise, all actions being equally cognizable in both the Common Law and Chancery Divisions. But it remains a matter of propriety and convenience to resort to equity in such cases, the machinery of the equity Courts and Chambers being peculiarly adapted to the examination of complicated matters of detail.

It is obvious that the jurisdiction of equity in matters of account brings a great variety of business within its purview. This is a natural consequence of the fact that an almost infinite variety of transactions involve questions of account; and, in addition to this, it is a well-established rule that when equity acquires jurisdiction on this ground, it extends its authority to other matters naturally, if not necessarily, attaching to such a jurisdiction. As incident to accounts, therefore, Courts of equity take "cognizance" of the administration of personal assets, consequently of "debts, legacies, the distribution of the residue, and the conduct of executors and administrators. As incident to accounts, they also take the concurrent jurisdiction of "tithes, and all questions relating thereto; of all dealings in partnership, and many other mercantile transactions; and so of bailiffs, factors, and receivers" (*i*).

Extent of the jurisdiction founded on account.

In dealing with the matters thus suggested, our course will be first to examine the most conspicuous of the principles by which equity is guided in the taking of accounts generally. Then we shall inquire with more particularity into the matters generally enumerated in the last paragraph, whose place in equitable jurisprudence is especially due to their involving matters of account.

Though we shall thus find that the heading of account is answerable for the greater part of the business which falls within the second division of our subject, there are

(*i*) Blackstone, Com. III. 437.

other peculiar remedies or features of procedure scarcely less fertile, but which do not call for particular comment in this place.

Partition. Somewhat analogous in principle to the taking of account is the partition of lands, involving, as it does, minute inquiries and valuations. And very similar to this is the settlement of doubtful and confused boundaries.

Specific performance. Another remedy of high importance, and the administration of which exemplifies some of the most important doctrines of equity, is that of Specific Performance, that is, the compelling a party to do specifically that which, from

Injunction. an equitable point of view, he ought to do. In some respects analogous to this is the remedy of Injunction, by which a party is restrained from doing acts which inequitably affect the interests of others.

The discussion of these remedies and the matters connected therewith is before us as constituting the second division of our subject.

CHAPTER I.

THE GENERAL PRINCIPLES OF ACCOUNT.

- I. *Appropriation of Payments.*
Clayton's Case.
- II. *Appropriation of Securities.*
Exp. Waring.
- III. *Set-off.*
- IV. *Apportionment.*
- V. *Contribution.*
- VI. *Defences to Action for Account.*

It has already been stated, and is very natural, that in taking an account, Courts of equity pay equal regard to legal and equitable claims. Wherever any fraudulent dealing has given rise to a constructive trust, or to an equitable claim in any way, or by the dealings of the parties an equitable lien has been created, or indeed any doctrine of equity intervenes to modify the legal position of the parties, full effect is given thereto, and the result of the inquiry is therefore, when confirmed by the Court, final, needing no supplemental proceedings to complete the determination of the parties' rights.

Legal and
equitable
claims
regarded.

I. *Appropriation of Payments.*

Appropriation
of payments.

The accounts which come before Courts of equity are frequently of such a nature as to call for decision as to the appropriation of payments appearing on one side thereof, to the debits appearing on the other. In other words, it often becomes material to ascertain to what debt a particular payment made by a debtor is to be applied. This question most commonly arises where there have been running accounts between debtor and creditor, various payments having been made and various credits given at different times.

The leading authority on this point is

CLAYTON'S CASE

[1 Mer. 572, 585],

Rules as to
appropriation.

from which we learn that the following rules, which are mainly derived from the Roman law, are applicable in equity.

Debtor has
first option.

1. A debtor making a payment has a right to appropriate it to the discharge of any debt due to his creditor.

The debtor may appropriate the payment by so stipulating in express terms (*a*), or his intention so to do may be inferred from the circumstances of the transaction; thus where one of the debts owing was secured and another unsecured, an intention first to discharge the secured debt was presumed (*b*).

Compared
with Roman
law.

In the Roman law this case would have come under another rule—viz., that in the absence of an express appropriation by either debtor or creditor, the law would appropriate the payment to the most burdensome debt. This rule does not, however, appear to be recognised in English law (*c*), and it therefore seemingly requires something more

(*a*) *Exp. Imbert*, 1 De G. & J. 152.

(*b*) *Young v. English*, 7 Beav. 10.

(*c*) *Mills v. Fowkes*, 5 Bing. N. S. 455, 461; *Att.-Gen. of Jamaica v. Manderson*, 6 Moo. P. C. 239.

than the mere fact that one of the debts is secured, to lead the Court to appropriate a payment to its extinction in priority to an unsecured debt of earlier date. In the case quoted it appears that the payment was made out of the proceeds of the security itself.

This right of appropriation by the debtor is, however, lost *unless exercised at the time of payment*. If he does not then declare on what account the money is paid, he cannot afterwards do so (*d*). Debtor can only exercise his right at time of payment.

2. If at the time of payment there is no express or implied appropriation thereof by the debtor, then the creditor has a right to make the appropriation. The creditor then has an option.

In Roman law this right of the creditor, like the corresponding one of the debtor, was lost unless exercised at the time of payment (*e*). But in English law this is not so; and the creditor may, it seems, make the appropriation at any time after payment and before action brought or account settled between him and his debtor (*f*). Exercisable at any time before action brought.

The creditor's right to make such appropriation is, however, subject to some limitations. He may not indirectly secure payment of an illegal debt by appropriating a general payment to its discharge (*g*). But a debt barred by the Statute of Limitations is not illegal, the statute being merely a bar to the remedy, not to the right: and if, therefore, a general payment is made, without appropriation by the debtor, it may be appropriated by the creditor to the discharge of a statute-barred debt (*h*). It must, nevertheless, be observed that it will not have the effect of reviving the debt (*h*); or, in other words, though by the appropriation the creditor may secure payment of a portion of a statute-barred debt, he does not by that means acquire a right of action for the remainder of May not appropriate to an illegal debt, but may to a debt statute-barred. Effect of this.

(*d*) *Wilkinson v. Sterne*, 9 Mod. 427.

(*e*) Dig. 46, 3.

(*f*) *Philpot v. Jones*, 2 A. & D. 41, 44; *Simson v. Ingham*, 2 B. & C. 65.

(*g*) *Wright v. Laing*, 3 B. & C. 165.

(*h*) *Mills v. Fowkes*, *sup.*; *Nash v. Hodgson*, 1 Jur. N. S. 946; 4 De G. M. & G. 474.

it. But if a debt is not barred, a general payment on account appropriated towards its liquidation will take it out of the operation of the statute; that is to say, the statutory period will again commence to run from the time of such payment and appropriation (*h*).

Appropriation by presumption of law according to priority.

3. In the absence of any appropriation by either debtor or creditor, an appropriation is made by presumption of law, according to the order of the items of account, the first item on the debit side being the item discharged or reduced by the first item on the credit side (*i*). This is the express point decided, and is commonly known as "the rule" in *Clayton's Case* (*k*), and is abundantly confirmed by subsequent authority (*l*).

Presumption may be rebutted.

This presumption may, however, be rebutted by evidence of a different intention (*m*); and thus, though the English rule falls short of that of Roman law already mentioned, there is a tendency in the same direction arising from the disposition to impute an intention to a debtor to appropriate his payment to the most onerous debt. The presumption may also be rebutted by the circumstances of the particular case. Thus, where an account was guaranteed, and after the guarantee came to an end through the death of the guarantor, a new account was opened with the debtor, and the debtor made payments without specific appropriation, it was held that the creditor was not bound to appropriate such payments to the guaranteed debt, so as *pro tanto* to release the estate of the guarantor (*n*), the rule in *Clayton's Case*, only applying where there is a continuous, unbroken account. Neither does the rule apply where a trustee or person holding money in a fiduciary character pays such money to his account with a banker. In such a

(*h*) *Nash v. Hodgson*, 4 De G. M. & G. 474.

(*i*) Coote, Mtges., p. 1224, ed. 5.

(*k*) 1 Mer. 585.

(*l*) *Pemberton v. Oakes*, 4 Russ. 154, 168; *Bk. of Scotland v. Christie*,

8 Cl. & F. 214.

(*m*) *City Discount Co. v. McLean*, 9 L. R. C. P. 692.

(*n*) *Re Sherry*, 25 Ch. D. 692, 702.

case the drawings out will be taken to be drawings of the debtor's own money in preference to the trust money. If the funds so paid in belonged to more than one *cestui que trust*, the rule would apply as between the *cestui que trust* (o).

Where a debt bearing interest stands against a debtor, general payments made by him are first to be applied in payment of interest, any balance beyond what is necessary for that being then credited in reduction of the principal (p). Payments appropriated to interest first.

We have seen that a creditor may appropriate a payment towards the liquidation of a statute-barred debt. If, however, there are several debts owing to him, some barred and some not so, and he does not expressly appropriate a payment made to him on account towards those that are barred, the presumption of law is that the payment is to be attributed to those not barred (q). In this respect, therefore, in the absence of an express appropriation, the law appropriates the payment to the best interest of the debtor. This evidently operates as a modification of the general rule that payments are appropriated by law to debts in order of time. It scarcely needs to be remarked by way of caution that in a continuous and current account the early debts, however old, are not statute-barred, being kept alive from time to time by any payments which are made within six years of their having been incurred. Presumption where some debts barred.

Questions of appropriation, perhaps, most frequently arise in cases where a firm has from time to time been changed, and eventually fails. It is to such cases that the rule in *Clayton's Case* especially applies. If a creditor seeks to fix a liability for the ultimate balance on a person who has been a partner during the currency of the account, but who is not so at the time of the failure, the account General effect of appropriation.

(o) *Re Hallett's Estate*, 25 Ch. D. 696. See *Pennell v. Deffell*, 4 De G. M. & G. 372; *Exp. Dale*, 11 Ch. D. 772.

(p) *Chase v. Box*, Freem. 261. See *Cockburn v. Edwards*, 18 Ch. D. 449.

(q) *Nash v. Hodgson*, *sup.*

will be taken on the presumption that the sums first paid in have been first drawn out, or that the debts first incurred have been first discharged. And no liability can be fixed on a former partner if, on working out this principle, it appears that all the debts owing when he ceased to be a partner have been subsequently discharged.

II. *Appropriation of Securities.*

Somewhat analogous in principle to the appropriation of payments is the doctrine of appropriation of securities to bills of exchange, which is applied when both drawer and acceptor of the bills become insolvent. The leading authority in cases of this description is the case of

EX PARTE WARING

[19 Ves. 345],

in which Lord Eldon decided that, where, as between the drawer and acceptor of a bill of exchange, a security has, by virtue of a contract between them, been specifically appropriated to meet that bill at maturity, and has been lodged for that purpose by the drawer with the acceptor, then, if both drawer and acceptor become insolvent, and their estates are brought under a forced administration, any person holding the bill is entitled to have the specifically appropriated security applied towards payment of the bill (*r*).

The following points must be observed as regulating the application of this rule:—

1. There must be a distinct appropriation of the security in question to the bill or to the debt against which the bill is drawn (*s*). The mere fact, for instance, that on a shipment of goods from A. to B., A. draws a bill on B.

(*r*) See rule in *Exp. Waring* by A. C. Eddis, p. 5.

(*s*) *Exp. Banner*, 2 Ch. D. 278; *City Bank v. Luckie*, 5 Ch. 773.

as against the cargo will not amount to a sufficient appropriation; and the bill holder will not be entitled to the proceeds of the cargo as against a consignee who applies it in reduction of a debt due to him from the consignor (*t*). The question of appropriation is an inference of fact, not a conclusion of law.

2. The rule only applies when both drawer and acceptor are insolvent and their respective estates are under forced administration. If either the drawer or acceptor of the bill is solvent, the bill holder of course gets paid in full, and needs no security (*u*); and the Court will not, by applying the rule, deprive any person of any rights of property which he may possess, unless he is under the jurisdiction of the Court. Consequently, the rule did not apply when, under the former bankruptcy laws, one party, though insolvent, executed a composition deed, but made no cession of his property (*v*). But the rule applies where the two insolvent estates are being wound up in any forced administration, whether in the Chancery Division or in bankruptcy (*v*).

3. It is essential that there should be a right of double proof—*i. e.*, a right to prove against both the insolvent estates for the full amount of the bill or debt (*x*).

III. *Set-off*.

There has been a marked distinction between the principles of law and equity as to the set-off of debts one against another.

1. Courts of law, indeed, always applied the principle at law.

(*t*) *Phelps, Stokes & Co. v. Comber*, 29 Ch. D. 813; 26 *ib.* 755; *Brown, Shipley & Co. v. Kough*, 29 *ib.* 845.

(*u*) *Powles v. Hargreaves*, 3 De G. M. & G. 430, 450.

(*v*) *Ibid.*; *Exp. General S. American Co.*, 10 Ch. 635.

(*x*) *Vaughan v. Halliday*, 9 Ch. 569.

of set-off to connected accounts of debit and credit, and allowed only the balance of the account to be recovered (*y*). But apart from legislation the principle was confined within very narrow limits. The mere existence of cross-demands between the same persons did not entitle one to set-off the debt owing to him against that which he owed. Unless they were substantially connected one with the other, the respective creditors could only sue in independent actions. For instance, if A. was indebted to B. in the sum of £5,000 on a bond, and B. subsequently borrowed £4,000 from A. also on a bond, payable at a different time or under different conditions from that of A., there was no legal set-off between them, and B. could have sued A. and obtained and enforced judgment against him for the whole £5,000, even though it may have been certain that B. would be unable to pay his debt when it became payable.

Statutory improvements.

It is unnecessary now to trace the steps by which the manifest imperfections of the law in this respect were from time to time removed by statutory interference (*z*). It suffices to say that the repugnance of its doctrines to natural equity sufficed to establish an equitable jurisdiction in many cases where set-off was reasonable, but was inadmissible at law.

Distinctions as to set-off in equity.

2. This jurisdiction was, however, subject to well-defined limitations, and generally followed the law. The cases in which equity differed from the law may generally be classed under one or other of three headings.

Where credit is mutual.

(1.) Notwithstanding that the debts in question arise from independent transactions, yet equity allows a set-off where, from the circumstances of the case, it appears that the party incurring the second debt acted in reliance on the former debt as a means of discharging it.

This is sometimes expressed by saying that though the debts are independent, the credit is mutual. It is illus-

(*y*) *Dale v. Sollet*, 4 Burr. 2133.

(*z*) See 9 Geo. II. c. 22.

trated by the case above put of the bonds given between A. and B. In such a case the nature of the transaction might well lead to the presumption that A. lent his money relying on the fact that on another account he was indebted to B., so that if B. should become insolvent A.'s advance should be esteemed a *pro tanto* payment of his liability. Equity gives effect to this presumption, though apart from the statutes referred to, it was disregarded at law (*a*). Similarly it was held at law under the statutes, that there was a mutual credit wherever one party being indebted to another entrusted him with goods, mutual credit being defined as meaning mutual trust, which must be presumed in such circumstances (*b*).

(2.) Where there are cross-demands of such a nature that if both had been recoverable at law they would have been subject to set-off, then if one of the demands is of an equitable nature the principle of set-off is applicable in equity.

Where one of the debts is equitable,

This was the case where, prior to the Judicature Acts, a legal debt was owing to a plaintiff by a defendant, and the defendant was assignee of a legal debt due to a third person from the plaintiff; then if the debts were of such a nature that they might have been set-off in law under the statutes, they were subject to set-off in equity (*c*).

as formerly in assignments of debts.

It is evident that this class of cases is rendered completely obsolete by the Judicature Acts.

(3.) There are certain cases where on special equitable grounds set-off is allowed in equity.

Where there are special grounds.

Thus, though in equity no more than at law is it permitted to set-off debts accrued in different rights (for instance, a joint debt against a separate debt, or *vice versa* (*d*); or a debt due from a person individually against

Debts occurring in different rights.

(a) *Lanesborough v. Jones*, 1 P. Wms. 326; *H. v. Prescott*, 1 Atk. 230.

(b) *Olive v. Th.*, 5 Taunt. 56; *Key v. Flin*, 21; *Roxburgh v. Cox*, 17 C.

1883, O. XIX. r. 3.

(c) *Clarke v. Cort*, Cr. & Ph. 154; *Williams v. Davies*, 2 Sim. 461.

(d) *McEwan v. Crombie*, 25 Ch. D. 175; *Bowyear v. Pauson*, 6 Q. B. D. 540.

When joint
and separate
debts set-off
fraud.

a debt due to him as executor of another (*e*), yet where a joint creditor has been guilty of fraud in relation to the separate property of one of the debtors—for instance, has misapplied it, and deceived the latter—it has been held, that in case of bankruptcy, the separate debt arising by such misapplication may be set-off against the joint debt (*f*).

Suretyship.

So also in cases where one of the joint debtors has been only surety for the other, he may set-off the debt due to his principal from the creditor; and, generally, a joint debt may in equity be set-off against a separate debt where it is clear that joint credit was given on account of the separate debt (*g*).

On similar principles, though, generally speaking, a debt incurred by a person in his private capacity could not be set-off against a debt due to him as executor or trustee (*h*), nor a debt due from a testator be set-off against a debt due to his executor (*i*), yet special circumstances, such as an identity of interest in the two debts, may suffice to give a right of set-off, notwithstanding the formal difference as to the characters (*k*). The principles of set-off have apparently not been affected by the new procedure rules under the Judicature Acts (*l*).

Set-off dis-
allowed in
winding-up ;

(4.) *Vice versâ*, the equity of third persons will sometimes intervene to prevent a set-off, when otherwise it might have been allowed. Thus a shareholder in a limited company who is also a creditor, cannot, in the compulsory winding up of the company, set-off the amount due to him as creditor against the amount due from him for calls (*m*). He must pay his calls in full, and then stand on the same footing as other creditors in respect of the debt due to him;

(*e*) *Re Hodgson*, 9 Ch. D. 673;
Hallett v. H., 13 ib. 232.

(*f*) *Exp. Stephens*, 11 Ves. 24;
Exp. Blagden, 19 Ves. 465, 467.

(*g*) *Vulliamy v. Noble*, 3 Mer.
593, 621; *Exp. Stephens*, *sup.*

(*h*) *Freeman v. Lomas*, 9 Ha. 109;
Exp. Kingston, 6 Ch. 632.

(*i*) *Lambarde v. Older*, 17 Beav.
542.

(*k*) *Bailey v. Finch*, 7 L. R. Q. B.
34.

(*l*) See cases, *infra*; O. XIX.
r. 3.

(*m*) *Grissell's Case*, 1 Ch. 528;
Comps. Act, 1862, 25 & 26 Vict.
c. 89, s. 101.

and the same rule, it seems, applies in a voluntary winding-up (*n*). For the same reason there is no set-off allowed in favour of directors who are creditors of the company (*o*). A set-off is allowable where a shareholder is bankrupt, whether the claim is made in the bankruptcy or in the winding-up; that is to say, whichever way the balance is (*p*). These cases are governed by the express enactment of the Bankruptcy Act, that in bankruptcy, where there have been mutual dealings between the bankrupt and a person proving in the bankruptcy, the sum due from one party shall be set-off against any sum due from the other party (*q*). allowed in
bankruptcy.

IV. *Apportionment.*

The principles of equity applicable to account are further distinguished from those of law by its fuller application of the doctrine of apportionment. Apportion-
ment.

Examples of this have already been given; for instance, in the case of an apprenticeship prematurely determined by bankruptcy (*r*). But it should be observed that there is no similar right when the contract has been put an end to by death (*s*). Other cases of contracts which were not divisible at law form equally apt illustrations: thus, if a contract to serve for a year for £100 was determined by death at the end of nine months, no remuneration at all could have been legally recovered (*t*). In such cases equity will grant redress wherever it discovers circumstances of mistake, accident or fraud (*u*). Contracts.

(*n*) *Re Whitehouse & Co.*, 9 Ch. D. 595; but see *Brighton Arcade Co. v. Dowling*, 3 L. R. C. P. 175.

(*o*) *Re Exchange Bank*, 21 Ch. D. 519; *Re Milan Tramways*, 25 *ib.* 587; 22 *ib.* 122.

(*p*) *In re Duckworth*, 2 Ch. 578; *Exp. Strang*, 5 Ch. 492.

(*q*) 46 & 47 Vict. c. 52, s. 38.

(*r*) *Hale v. Webb*, 2 Bro. C. C.

78; *supra*, p. 223; 46 & 47 Vict. c. 52, s. 41.

(*s*) *Whincup v. Hughes*, 6 L. R. C. P. 78; *Ferns v. Carr*, 28 Ch. D. 409, overruling *Hirst v. Tolson*, 2 Mac. & G. 134.

(*t*) *Story*, 471; *Corp. of Plymouth v. Throgmorton*, 1 Salk. 65; 3 Mod. 153.

(*u*) *Story*, 472.

Rents.

Apportionment Act,
1870.

Rents, again, were at common law not apportionable, and the consequences of this doctrine were continually productive of injustice when a tenant for life died in the interval between two rent days. The full consideration of the difficulties thus arising is not, however, here required, equity having so far followed the law as to render necessary a resort to the legislature (*x*). By the statutes 11 Geo. II. c. 19, and 5 Will. IV. c. 22, the greatest of the inconveniences were removed; and now, by the Apportionment Act, 1870 (*y*), it is provided that in future all rents and other periodical payments in the nature of income shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly (*z*). The Act applies to the case of a tenant for life dying since the Act, though taking under an instrument dated previously thereto (*a*). But in the case of an investment of trust funds which are limited to successive beneficiaries, there is no power to apportion profits already accrued for the benefit of the remaindermen; the tenant for life is entitled to the whole of the dividend when declared (*b*).

Previous to this Act, there were some cases in which apportionment might have been had in equity though not in law. Thus where portions were payable to daughters at eighteen or marriage, and until then maintenance was allowed, if a daughter came of age or married in the intermediate period, maintenance was apportionable in equity (*c*).

(*x*) But see *Meeley v. Webber*, cited, 2 Eq. Abr. 704; *Aynsley v. Woods-worth*, 2 V. & B. 331.

(*y*) 33 & 34 Vict. c. 35.

(*z*) s. 2.

(*a*) *Re Cline's Estate*, 18 Eq. 213; *Lawrence v. L.*, 26 Ch. D. 795.

(*b*) *Barker v. Perowne*, 18 Ch. D. 160.

(*c*) *Hay v. Palmer*, 2 P. Wms. 501.

V. *Contribution.*

The principle of contribution, although in most cases recognised at common law, was capable of much more convenient application under the procedure of equity. At law, where lands subject to a charge were subjected to a partition, or sold in lots, one of the several owners paying the charge could recover contribution from the others; but his remedy lay in actions against them individually, whereas equity could ascertain the proportions, and finally determine the question by one judgment in one suit. It has been held that one tenant in common of a house who expends money on ordinary repairs, not being such as are necessary to prevent the house from going to ruin, has no right of action against his co-tenant for contribution (*d*).

Other instances of the equitable application of the principle of contribution will be found in the Chapters on Sureties (*e*) and on Trustees (*f*).

VI. *Defences to an Action for Account.*

1. When an account has been once settled, and a balance struck, equity will not usually interfere, the remedy at law for the recovery of the balance being complete (*g*). The fact of such a settlement, therefore, usually affords a conclusive defence to an action for an account; and extensive lapse of time naturally adds to the weight of the defence.

In such cases it is often a matter of dispute whether a settlement has or has not in fact been concluded. A formal examination and signature of the account by the parties is the best evidence of such a settlement; but other circumstances may suffice to evidence a binding acceptance

(*d*) *Leigh v. Dickeson*, 15 Q. B. D. 60; 12 *ib.* 194.

(*e*) p. 357 *et seq.*

s.

(*f*) p. 132.

(*g*) *Dawson v. D.*, 1 Atk. 1.

of the account (*h*). Where, for instance, an account has been delivered, and no objection is made within a reasonable time, the extent of which will of course depend upon the nature of the account, acquiescence in the settlement will be implied, and the account will be deemed a stated account (*h*). The mere delivery of an account will not, however, suffice to establish the fact of a settlement (*i*). The question is one which depends on the intention of the parties, and if the Court is satisfied as to this, a mere irregularity or informality in the mode of taking the account will not be a sufficient reason for re-opening it (*k*).

When
accounts
re-opened.

When in an action for an account the defence alleges a settlement, one of two courses may be open to the plaintiff. In some circumstances equity will not refuse to reopen the account, notwithstanding a settlement. The most potent of these is fraud. Thus if the parties to the settlement were not on equal terms, and it appears that one has been deceived, or has acted under duress, equity will grant relief (*l*). Such cases fall under the general principle of relief against fraud (*m*), which has already been considered. Similarly, on grounds of mistake or accident, equity will sometimes reopen an account; and this will always be done the more readily where there is a confidential relation between the parties, such as that of trustee and *cestui que trust*, or solicitor and client (*n*). The mere proof of a single error is not sufficient. The proper remedy in such a case is to give leave to surcharge and falsify (*o*). Where compound interest was charged in a mortgage account by mistake, the account though settled was reopened. It was considered, that though the giving of credit therefor in account might have been treated as so far equivalent to

(*h*) *Willis v. Jernegan*, 2 Atk. 251.

(*i*) *Irving v. Young*, 1 S. & S. 333.

(*k*) *Exp. Barber*, 5 Ch. 687; *Holgate v. Shutt*, 28 Ch. D. 111; 27 *ib.* 111.

(*l*) *Vernon v. Fawdry*, 2 Atk. 119;

Clarke v. Tipping, 9 Beav. 284.

(*m*) *Holgate v. Shutt*, *sup.*

(*n*) *Matthews v. Wallwyn*, 4 Ves. 125; *Todd v. Wilson*, 9 Beav. 486;

Ward v. Sharpe, W. N. 1884, p. 5.

(*o*) *Gething v. Keighley*, 9 Ch. D. 547.

payment by mistake of law as to bar their recovery at law, in equity the line between mistakes of law and mistakes of fact had not been so sharply drawn (*p*). When an account is thus wholly reopened, it is, of course, taken as at first, the burden of proof resting on each party to prove that which he claims to stand to his credit.

But in other cases, though there may not be sufficient grounds to induce the Court wholly to reopen the account, it may grant leave to the plaintiff to surcharge and falsify, the effect of which is to throw on him alone the burden of proving any omission or error. If he can establish the omission of some item in his favour, or the insufficiency in form, of the account (*q*), he will be allowed to surcharge; if an error, the falsification will be rectified; but the *onus probandi* is wholly on him, the account, as a whole, being deemed *primâ facie* correct (*r*). Questions of law, as well as of fact, may be raised upon leave to surcharge and falsify (*s*).

Liberty to
surcharge
and falsify.

2. Unless excluded by the existence of an express trust, the Statute of Limitations applies to an action for an account in equity as well as at law; and not only so, but equity sometimes refuses to interfere with accounts on the ground of *laches*, though not extending to the statutory period. The maxim, "*Vigilantibus non dormientibus æquitas subvenit*," is peculiarly applicable to such cases as those in question, the proofs in which are so liable to destruction by lapse of time (*t*).

Statute of
Limitations.

Laches.

(*p*) *Daniell v. Sinclair*, 6 App. C. 181.

(*q*) *Noyes v. Pollock*, 30 Ch. D. 336.

(*r*) *Pitt v. Cholmondeley*, 2 Ves. sr. 565.

(*s*) *Roberts v. Kuffin*, 2 Atk. 112.

(*t*) *Banner v. Berridge*, 18 Ch. D. 254.

CHAPTER II.

THE ADMINISTRATION OF ASSETS.

SECTION I.—ADMINISTRATION GENERALLY.

- I. *What is meant by Assets.*
Distinctions between Legal and Equitable Assets.
- II. *The Priority of Debts.*
- III. *Order of Administration.*
Ancaster v. Mayer.
- IV. *Payment of Mortgage Debts.*
- V. *Marshalling of Assets.*
Aldrich v. Cooper.
- VI. *Marshalling of Securities.*

I. *What is meant by Assets.*

Assets
defined.

1. UNDER the ancient common law the debts of a deceased person were always payable out of his personal estate. The personal estate vested in the legal personal representative as soon as constituted, and to him the creditor must resort for satisfaction. But the personal representative, whether executor or administrator, was only chargeable to the extent of the personal estate of the debtor in his hands. This was termed "assets." The completeness of the creditor's remedy depended upon whether it was "*assets*," or sufficient to meet all the debts.

2. It was for a long time quite dependent upon a person's Real assets. option whether or not his real property should be available for the payment of debts, in case the personalty should prove insufficient. He might bind his heirs by deed or specialty to the payment of any debt or the fulfilment of any contract, to the value of the lands descending. In this case the position of the heir with respect to such specialty debts was similar to that of the executor or administrator with respect to debts generally; and the lands so descended were then termed real assets, or assets by descent. But the heir was not at all bound unless he was named in the deed or covenant, and, since he was only liable in any case to the extent of lands descending, the expectation of the specialty creditor, even when the heir was named, was wholly defeated if the testator devised his real estate away from his heir. There was no law to charge the devisee, and the heir took nothing to be charged.

3. At length a statute was passed commonly known as Statutory real assets; the Statute of Fraudulent Devises (*a*), which made void 3 & 4 Will. & M. c. 14. all devises by will as against creditors by specialty in which the heirs were bound. Still, creditors who had not fortified themselves by securing a bond or covenant under seal were at the mercy of their debtor so far as concerned his real estate. The next step in their favour was taken in 1807, when, by 47 Geo. III. c. 74, the fee simple estates 47 Geo. III. c. 74. of deceased *traders* were rendered liable to simple contract as well as to specialty debts. In 1833 this remedy of creditors ceased to be confined to the case of traders, it being enacted by 3 & 4 Will. IV. c. 104, that all fee simple 3 & 4 Will. IV. c. 104. estates not charged with or devised subject to the payment of debts should be liable to be administered in the Court of Chancery for the payment of all the just debts of the deceased owner, whether by simple contract or specialty.

(*a*) 3 & 4 Will. & M. c. 14.

By these steps fee-simple estates at length became assets for the payment of all debts.

Equitable
assets.

4. But meanwhile the honesty of testators had devised a means by which creditors might obtain a satisfaction out of their real estate which the law did not afford them. It became a common thing for testators to expressly devise their lands to trustees upon trust for sale for the payment of their debts; or, which was, so far as concerned creditors, the same in effect, to charge their lands in the hands of the devisees with the payment of their debts. It is evident that the lands thus expressly made available for creditors were in a very different position from lands descending, or made legally liable to debts by statute. In the case of lands devised on trust for sale for or charged with payment of debts, the legal personal representative had nothing at all to do with them. The funds in his hands were the same as before, and to avail themselves of the testator's directions in their favour the creditors could not sue the executor or administrator, but were required to proceed in Chancery for the performance of the trust created in their favour. The lands thus brought within their reach were termed *equitable assets*.

How distin-
guished from
legal assets.

It will be observed that the distinction between legal and equitable assets does not at all relate to the nature of the title to the property itself. Thus an equity of redemption of a leasehold is of course an equitable interest; but it would none the less, on the death of the owner, become legal assets, because it would devolve upon the personal representative. The real test is whether or not the property comes to the executor *virtute officii*. If it does, it forms legal assets; if it does not, but the creditor has to resort to the Court of Chancery to secure the benefit of it, it is equitable assets. The distinction thus refers to *the remedy of the creditor, not to the nature of the property (b)*.

(b) *Cook v. Gregson*, 3 Drew. 549.

Nor are lands thus devised on trust for sale or charged with debts the only species of equitable assets. The same principle which distinguishes them from legal assets includes also the equitable separate estate, whether real or personal, of married women, this being a creature of equity, and its liability to debts being recognised only in equity (*c*); and it was held that separate estate arising under the Married Women's Property Act, 1870, was subject to the same rules (*d*). But by virtue of s. 23 of the Married Women's Property Act of 1882 (*e*), the separate property of a married woman under the Act now vests in her legal personal representative *virtute officii*, and therefore must, it is submitted, be regarded as legal assets. A third species of equitable assets is property over which a testator has exercised a general power of appointment, which again does not come to the hands of the executor *virtute officii* (*f*).

Species of equitable assets.

Until quite recently the distinction between legal and equitable assets was of great importance. In the administration or distribution of legal assets, a certain definite order of priority was observed between different species of debts. This order we shall presently consider in greater detail; at present it suffices, by way of illustration, to state that creditors by specialty were entitled to be paid in full before any payments were made to those whose claims arose from simple contracts. And when all debts were made recoverable out of real estates by the statute of 1833, this order of priority was not interfered with. The Court of Chancery, however, has always observed as a maxim that "*Equality is equity*." In its distribution of equitable assets, therefore, it disregarded the legal rules as to priority, and treated all creditors, whatever the nature of their claims, *pari passu*. Moreover, it went farther than this in its favour of equality. Where there was a mixed

Characteristics of equitable assets.

(*c*) *Owens v. Dickenson*, Cr. & Ph. D. 739.

48. (*e*) 45 & 46 Vict. c. 75.

(*d*) *Thompson v. Bennett*, 6 Ch. (*f*) *Pardo v. Bingham*, 6 Eq. 485.

fund of legal and equitable assets, and the specialty creditors, availing themselves of their priority with respect to the former, exhausted them, so as to leave nothing for the simple contract creditors, equity would not suffer any specialty creditor to receive any part of the equitable assets until the simple contract creditors were paid up to an equality with what the specialty creditors received from the legal assets (*g*).

It has been observed that the creation of equitable assets was not interfered with by 3 & 4 Will. IV. c. 104, lands devised charged with debts or on trust for their payment being excepted from its operation. The same exception had been made in 3 & 4 Will. & M. c. 14. One consequence, therefore, of the equitable method of distribution of equitable assets, was that a testator who had at law given a creditor the security of a bond, or other specialty binding his heirs, might defeat the legal priority thus bestowed by devising his realty charged with debts, and by this means placing its distribution in the hands of Chancery.

32 & 33 Vict.
c. 46.

5. Two recent statutes have, however, to a great extent destroyed the importance of the distinction between legal and equitable assets. First, by 32 & 33 Vict. c. 46, it is enacted that, "In the administration of the estate of every person who shall die on or after the 1st day of January, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or personal, any statute or other law to the contrary notwithstanding; provided, also, that this Act

(*g*) *Plunket v. Penson*, 2 Atk. 290; *Bain v. Sadler*, 12 Eq. 570.

“ shall not prejudice or affect any lien or charge, or other security which any creditor may hold or be entitled to for the payment of his debt.”

6. Again, by s. 10 of the Judicature Act, 1875 (*h*), it is enacted that, “ In the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities . . . the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt.” Judicature Act, 1875, s. 10.

The former of these statutes came into operation on the 1st January, 1870, the latter on the 1st November, 1875 (*i*). As to persons who died before the end of 1869, the old rules as to priority in administration therefore remain applicable; and as to persons who died between that date and the 1st of November, 1875, the old rules apply, except that specialty and simple contract creditors stand on the same footing. As cases still occur to which neither of the statutes apply, the old law cannot yet be treated as entirely obsolete; and it is accordingly necessary in considering the details of administration to distinguish between the three periods indicated.

(*h*) 38 & 39 Vict. c. 77.

(*i*) *Sherwin v. Selkirk*, 12 Ch. D. 68.

II. *Priority of Debts.*1. *Before 32 & 33 Vict. c. 46.*

The following is the order in which the executor was and is required to pay out of legal assets the debts owing by testators who died previous to the 1st of January, 1870 :

Debts to
Crown by
record or
specialty.

(1.) Debts due to the Crown by record or specialty. Debts not of record or specialty have not absolute priority, but they nevertheless have priority over debts of equal degree due to subjects (*k*).

Statutory
priority.

(2.) Debts to which particular statutes give priority—for instance, poor rates, by virtue of 17 Geo. II. c. 38; regimental debts, by virtue of 26 & 27 Vict. c. 57; certain liabilities to building societies (*l*), and to friendly societies (*m*).

Registered
judgments,

(3.) Judgment debts duly registered. Final decrees, and orders of Courts of equity ordering money to be paid to a person, have the same effect as judgments at law (*n*).

and judgments
against
executor.

Pari passu with such judgments and decrees rank judgments recovered against the personal representative himself, even though unregistered (*o*).

Registration was required of judgments against the deceased debtor, for the protection of the personal representative, who would otherwise be subject to unavoidable loss by exhausting the assets in paying debts of inferior degree, and then finding himself liable to a judgment debt of which he had no knowledge. Of course, in the case of a judgment against himself, no such reason applied to deprive the creditor of the reward of his superior diligence.

Statutes and
recognizances.

(4.) Debts of record other than judgments—*e.g.*, statutes and recognizances. Statutes have long been obsolete. Re-

(*k*) *Re Henley & Co.*, 9 Ch. D. 481.

(*l*) 4 & 5 Will. IV. c. 40, s. 12.

(*n*) 38 & 39 Vict. c. 60, s. 15.

(*n*) 1 & 2 Vict. c. 110, s. 18;

Wilson v. Dunsany, 18 Beav. 299.

(*o*) *Williams v. W.*, 15 Eq. 270.

cognizances are, however, continually employed—for instance, they are required from persons appointed by the Court of Chancery as receivers, and a debt from a receiver for this reason ranks as a debt of record (*p*).

(5.) Debts by specialty contracts for valuable consideration, whether the heir is or is not bound. A mere recital of a debt in a deed does not constitute it a specialty debt. It is necessary that it should be created, or at least novated, by the deed (*q*). Specialty debts.

Arrears of rent service rank equally with debts by specialty, even though the rent be reserved by parol. The liability of a contributory in the winding-up of a company under the Companies Act, 1862, is also of the nature of a specialty debt (*r*). A voluntary bond assigned for value in the lifetime of the obligor was held to rank as a specialty (*s*).

(6.) Unregistered judgments against the deceased debtor (*t*), and debts by simple contract. These comprise debts due on negotiable instruments, and also liabilities in respect of breaches of trust not being breaches of covenant under seal (*u*). Unregistered judgments against deceased, and simple contract debts.

(7.) Voluntary bonds or covenants in the hands of a volunteer. These, though postponed to all contract debts, were considered by virtue of their antecedent legal title to have priority over legatees (*x*). The holder of a voluntary bond may, moreover, sustain a creditor's suit for administration, and his claim is preferred to a claim for interest upon debts which do not carry interest at law (*y*). Voluntary bonds and covenants.

Such is the order of payment so far as unaffected by legislation. Before considering the effects of the statutes which have modified it, it may be well to mention certain

(*p*) *Seagram v. Tuck*, 18 Ch. D. 296.

(*q*) *Iven v. Elwes*, 3 Drew. 25.

(*r*) 25 & 26 Vict. c. 89, ss. 75, 76; *Buck v. Robson*, 10 Eq. 629.

(*s*) *Payne v. Mortimer*, 4 De G. & J. 447, 452.

(*t*) *Van Gheluive v. Nerinckx*, 21 Ch. D. 189.

(*u*) *Adey v. Arnold*, 2 De G. M. & G. 432.

(*x*) *Fletcher v. F.*, 4 Ha. 74.

(*y*) *Garrard v. Dinorben*, 5 Ha. 213.

liabilities and powers of executors which have special reference to the rules as to priority.

2. *Rights and liabilities of executors, &c.*

Executor's
liability to
creditors.

(1.) An executor who, having notice of a superior debt, voluntarily pays one of inferior order, thereby renders himself personally liable, in case of a deficiency of assets, to pay the former debt. He was at one time presumed to have notice of judgments and decrees in equity against the deceased. But from the hardship which thus threatened him he was relieved by various statutes, which rendered such judgments of no effect against him unless docketed or registered (z). As regards other debts, he was not liable, except in case of actual notice (a).

Power of
preference.

(2.) Among creditors of equal degree an executor may pay one in preference to another (b).

Retainer.

(3.) An executor or administrator, to whom a debt, whether legal or equitable, was owing by the deceased person, has a right to retain his debt out of the legal assets in priority to other creditors of equal degree (c). He cannot, however, retain as against any debt of superior degree, such as a specialty debt, notwithstanding that specialty debts now, for general administration purposes, rank with simple contracts (d). He can only retain out of such assets as come to his own hands; thus, though a decree in an administration action is no hindrance to the right (e), if a receiver is appointed there is no retainer out of funds received by him (f). A statute-barred debt may be retained (g), but not a debt the right to which, as well as the remedy, is barred by a non-compliance with the

(z) 4 & 5 Will. & M. c. 20; 1 & 2 Vict. c. 110; 2 & 3 Vict. c. 11; 23 & 24 Vict. c. 38.

(a) *Brooking v. Jennings*, 1 Mod. 175.

(b) *Lyttleton v. Cross*, 3 B. & C. 317, 322; *Williams' Executors*, p. 1036, ed. 8.

(c) *Cockcroft v. Black*, 2 P. Wms. 298.

(d) *Wilson v. Coxwell*, 23 Ch. D. 764; *Calver v. Laxton*, 31 *ib.* 440.

(e) *Campbell v. C.*, 16 Ch. D. 198.

(f) *Calver v. Laxton*, *sup.*; *Lattimer v. Harrison*, 32 Ch. D. 395.

(g) *Stahlschmidt v. Lett*, 1 Sm. & G. 415.

Statute of Frauds (*h*). An executor of an executor or administrator who has asserted the right in his lifetime, may similarly retain for a debt due to the executor or administrator (*i*). And a husband who is executor may retain for a debt due to his wife, or, if his wife was executrix, may retain for a debt due to himself or his wife (*k*).

No such rights of retainer exist with respect to equitable assets; but though the Judicature Act has, as far as regards the order of distribution, in some respects put equitable and legal assets upon the same footing, it has been held that it does not interfere with the well-established right of retainer out of legal assets (*l*).

There are two ways in which a legal personal representative may secure himself from his primary liability for the debts of the deceased. First, by throwing the administration into the hands of the Court. As long as the estate is being administered, the creditor's remedy is of course to prove his debt therein. When the administration is complete, his only resource is to follow the assets into the hands of the residuary legatee or next of kin (*m*). Secondly, the legal personal representative may obtain a statutory protection under 22 & 23 Vict. c. 35, s. 29, by issuing regular notices, and distributing the estate in accordance therewith (*n*). If, however, he administers out of Court on his own responsibility, he remains *primâ facie* liable to the claim of any unpaid creditor, though if required to pay a debt of which at the time of distribution he had no notice, he would be entitled to call upon the residuary legatee or next of kin to refund (*o*).

When executor not liable.

(*h*) *Field v. White*, 29 Ch. D. 358.

(*i*) *Hopton v. Dryden*, Prec. Ch. 180; *Weeks v. Gore*, 3 P. Wms. 184, n.; *Norton v. Compton*, 30 Ch. D. 15.

(*k*) *Atkinson v. Rawson*, 1 Mod. 208. See *Re McMyn*, 33 Ch. D.

575.

(*l*) *Lee v. Nuttall*, 12 Ch. D. 61; *Richmond v. White*, *ib.* 361.

(*m*) *Thomas v. Griffiths*, 2 Giff. 504; 2 De G. F. & J. 555.

(*n*) *Clegg v. Rowland*, 3 Eq. 368.

(*o*) *Jervis v. Wolfestan*, 18 Eq. 18.

3. *Priority of debts under 32 & 33 Vict. c. 46.*

Effect of
32 & 33 Vict.
c. 46.

We have seen that this Act places specialty debts on the same level and footing as debts by simple contract. And it includes in its operation those other debts which we have mentioned as previously ranking with specialty debts—viz., debts due from contributories in the winding-up of companies and arrears of rent (*o*).

With this exception, however, the order remains as before. Debts to the Crown, judgments, and other debts of record retain their former position. And this being so, a creditor in an administration under this Act who secures a judgment against an executor for a simple contract debt, thereby actually gains priority over a creditor by special contract (*p*). The executor's right of retainer was not affected by this Act (*q*).

An heir or devisee of real estate has no right of retainer out of descended or devised lands for a debt due to him in respect of simple contract debts. Specialty debts, it appears, may be retained thereout (*r*).

4. *Priority under the Judicature Act, 1875 (s).*

Effect of
Judicature
Act, s. 10.

The above quoted section of this Act has in some respects completely changed the method of administration as regards the debts of persons dying since the 1st of November, 1875; but nevertheless the effect of this enactment does not appear to be so extensive as at first sight one might suppose.

Applies to
insolvent
estates only.

In the first place, its application is confined to cases of the administration by the Court of *insolvent* estates. And again, where no recourse is had to the Court for the administration of insolvent estates, the priorities of creditors are determined by the old law.

How far rules

Further, the law of bankruptcy is by this section, even

(*o*) *Shirreff v. Hastings*, 6 Ch. D. 368.
610.

(*p*) *Hanson v. Stubbs*, 8 Ch. D. 154.
154.

(*q*) *Crowder v. Stewart*, 16 Ch. D. 379.
(*s*) 38 & 39 Vict. c. 77.

(*r*) *Re Illidge*, 27 Ch. D. 478; 24
ib. 654; *Ferguson v. Gibson*, 14 Eq.

when it operates, only to be applied in three respects: of bankruptcy applied.
 (1) As to respective rights of secured and unsecured creditors; (2) As to the debts and liabilities proveable; (3) As to the valuation of annuities and future and contingent liabilities. It is only the first of these heads which can affect the rules as to priorities now under view. The question is, to what extent it modifies the previous law.

In one respect the change introduced is obvious. In Secured debts equity a mortgagee has always been allowed to pursue all his remedies concurrently; his enforcement of one does not prejudice him in the prosecution of another; he may at the same time sue personally for his debt, and proceed to enforce his specific security by foreclosure or sale. It was held in an important case (t) that the death of the mortgagor made no difference to this right, and that thus *Mason v. Bogg*. in the administration of his estate the mortgagee might share rateably with other creditors by proving for the full amount of his debt against the estate; and having received his dividend, might proceed to realise his security, and retain thereout the whole balance due to him. He might thus receive twenty shillings in the pound, while the unsecured creditors had to be satisfied with a small dividend.

Under the Bankruptcy Acts, the position of a mortgagee or other secured creditor is, however, much less advantageous. By s. 39 and the second schedule of the Act of 1883 (u), which follows in this respect the previous Act, he is required to elect whether he will prove for his whole debt, and at the same time give up his security for the benefit of the estate; or whether he will retain his security, and after valuation, or sale of it, prove only for the balance of his debt. The effect of his security is thus not prejudiced, but as regards the balance of his debt he is in no better position than any other creditor; and if not fully

(t) *Mason v. Bogg*, 2 My. & Cr. 443.

(u) 46 & 47 Vict. c. 52.

Judicature
Act.

secured, he cannot receive twenty shillings in the pound unless the unsecured creditors do so also.

The effect of the Judicature Act, then, is clearly to substitute this rule for the rule established by *Mason v. Bogg* (v) in the administration by the Court of insolvent estates. But it has no further effects as to the priorities of debts (x). Certain priorities among debts are definitely laid down in the Bankruptcy Act. By s. 40, certain rates and taxes and certain wages and salaries are to be paid before general debts, and with these exceptions all debts proveable under the bankruptcy are to be paid *pari passu*. Now these preferential debts are quite different from those to which priority was given in administration. The difference is two-fold; on the one hand, bankruptcy gives no priority to judgments registered or unregistered, or to recognizances, over simple contract debts; on the other hand, in administration no preference was shown for wages and salaries; and these differences remain unaffected. In *Lee v. Nuttall* (y), James, L. J., said: "The sole object of the 10th section, as it appears to me, was to get rid of the rule in Chancery under which a secured creditor could prove for the full amount of his debt and realise his security afterwards, and to put him on the same footing as in bankruptcy" (z). It has further been decided that in the winding-up of companies to which the same words in the same section apply, the preferences recognized in bankruptcy do not operate (a).

(v) 2 My. & Cr. 443.

(x) *Smith v. Morgan*, 5 C. P. D. 337.

(y) 12 Ch. D. 61. And see *Winehouse v. W.*, 20 Ch. D. 545.

(z) *Ibid.*; *Richmond v. White*, 12 Ch. D. 361.

(a) *Re Albion, &c. Co.*, 7 Ch. D. 547; *Re Withernsea Brickworks*, 16 Ch. D. 337.

III. *Order of Administration.*

Such being the order of priority *inter se* of the creditors of a deceased person, the next inquiry is as to the order in which the assets will be applied in the discharge of the liabilities. This inquiry in effect ascertains the respective priorities of the various classes of persons who claim to take the deceased's estate beneficially.

It will, of course, be remembered in considering this question, that the points now to be raised do not in any way interfere with a creditor's rights. His remedies extend to the whole of the assets, and are not prejudiced by any claims which the different classes of legatees, devisees, &c., may have *inter se*. Under the head of Marshalling we shall see how those claims are adjusted, if the creditor, in pursuance of his rights, resorts to the assets in an order contrary to that which the law prescribes as between the beneficiaries.

Rights of
creditors not
affected by
order.

1. It was well established in the case of

General
personalty
first liable.

ANCASTER v. MAYER

[1 Bro. C. C. 454; 1 W. & T. L. C. 681],

and has ever since been the rule, that in the administration of the estates of deceased persons, the general personal estate is the primary fund for the payment of their debts. In order to avoid this primary liability, it is necessary that the personal estate should be exempted, either by express words or by the indication of a manifest intention to the contrary.

Exemption by express words is so plain a matter as to need no exposition or illustration. But the question as to what amounts to a manifest indication of intention to exempt the personalty is one which has caused such difficulty to judges as to have elicited frequent expressions of the wish that nothing but express words had been permitted to alter the course and order of law.

Exemption:
express,
implied.

S.

M M

Onus of proof. It must be always remembered that the burden of proof lies on those who claim to have the personalty exonerated (*b*). Bearing this in mind, we shall first state what is not considered a sufficiently manifest indication of this intention; and, secondly, shall examine some cases in which the personalty was held to have been exonerated.

What does
not exempt
personalty.
Charge of
debts, &c.

(1.) Neither a charge of the debts upon the land, nor a direction to sell it for the payment of debts, nor the creation of a term for that purpose, nor even a devise upon the condition of the devisee's paying the testator's debts, will exempt the personalty from its primary liability (*c*). And the same rule was applied where the charge of the real estate was contained in a deed, and the testator by will recited the deed and disposed only of the residue of his property not comprised therein (*d*). It is necessary not only that the realty should be charged, but that the testator should indicate a purpose that the personalty should not be applied (*e*). Again, the mere charge of funeral or testamentary expenses, or both together with the debts upon the real estate, will not of itself exempt the personalty (*f*), though it may afford a strong argument in that direction (*g*).

Express
charge of
some debt on
personalty.

An express charge on the personalty of some particular debts, such as simple contract debts or legacies, for the payment of which it would without such charge be primarily liable, will not, by the application of the maxim, *Expressio unius est exclusio alterius*, raise a sufficient presumption that it was intended to be only an auxiliary fund for the payment of other liabilities not expressly charged upon it, but charged upon the land (*h*).

(*b*) *Whieldon v. Spode*, 15 Beav. 539.

(*c*) *Tower v. Rous*, 18 Ves. 132, 138; *White v. W.*, 2 Vern. 43; *Inchiquin v. French*, 1 Cox, 1; *Bridgman v. Dove*, 3 Atk. 201.

(*d*) *Trott v. Buchanan*, 28 Ch. D. 446.

(*e*) *Quennell v. Turner*, 13 Beav. 240; *Samwell v. Wake*, 1 Bro. C. C. 145.

(*f*) *Brydges v. Phillips*, 6 Ves. 570; *Bootle v. Blundell*, 1 Mer. 229.

(*g*) *Tower v. Rous*, 18 Ves. 132, 139.

(*h*) *Watson v. Brickwood*, 9 Ves. 447.

A bequest of all the personal estate, with or without specific description, will not, at least where the legatee is also appointed executor, be so distinguished from a general residuary bequest as to exonerate the personalty passing under such bequest, although lands are devised in trust to pay all the testator's debts (*i*). It has also been so decided where the legatee was not executor (*k*). Such a case is stronger, however, in favour of exoneration than the former, and has, when coupled with a charge of debts and funeral and testamentary expenses upon the realty, been often considered sufficient to constitute the real estate a primary fund for their payment (*l*). It is still stronger in favour of exoneration, if with such a bequest a particular real estate has been devised upon trust for payment of debts and funeral and testamentary expenses (*m*).

Bequest of
personalty.

Parol evidence is not admissible to show the intention of a testator to give his personal estate free from debts, nor will any inference be drawn concerning the testator's intention from a consideration of the relative amount of his personal estate and debts; and consequently no inquiry will be directed to ascertain such relative amount (*n*).

Parol evidence
not admis-
sible.

(2.) The primary liability of the general personal estate will be displaced by the appropriation of a specific part of the personal estate to the payment of debts, coupled with a bequest of the general residue. But if there is no such residuary bequest the residue will still remain primarily liable, notwithstanding the appropriation of the specific fund (*o*). On the same principle, it must be observed that even an express exemption of the personalty will not extend to the benefit of the next of kin claiming by a lapse (*p*).

Cases of
exemption.

Where a testator devised his real estate to be sold, and

(*i*) *Harewood v. Child*, stated Ca. t. Talb. 204; *Haslewood v. Pope*, 3 P. Wms. 324.

(*k*) *Collis v. Robins*, 1 De G. & Sm. 131; *Ouseley v. Anstruther*, 10 Beav. 453.

(*l*) *Greene v. G.*, 4 Madd. 148; *Driver v. Ferrand*, 1 R. & M. 681;

Gilbertson v. G., 34 Beav. 354; *Kilford v. Blaney*, 31 Ch. D. 56; 29 *ib.* 145.

(*m*) *Powell v. Riley*, 12 Eq. 175.

(*n*) *Tait v. Northwick*, 4 Ves. 816;

Stephenson v. Heathcote, 1 Ed. 38.

(*o*) *Boote v. Blundell*, 1 Mer. 220.

(*p*) *Waring v. Ward*, 5 Ves. 675.

directed the money to arise by the sale to be applied to pay mortgages and all other debts, the residue to be added to the personal estate, this was held to make the real estate the primary fund (*q*).

General
conclusion.

We are led, then, to the conclusion that the first fund to be resorted to for the payment of debts is the general personal estate; and that its primary liability will only be disturbed by an express declaration of such intention, or by dispositions which very clearly imply it. In the case of a mortgage debt there are other considerations involved, with a series of statutory modifications, which it is convenient to postpone for separate treatment.

Lands devised
on trust for
debts.

2. After the general personalty, the next fund resorted to for the payment of debts is land devised upon express trust for their payment (*r*). As we have seen, such land is equitable assets, and, therefore, in all cases distributed amongst creditors *pari passu*.

Lands
descended.

3. Next in order stand lands descended to the heir, and not charged with debts (*s*). Since 3 & 4 Will. IV. c. 106, if there is a specific devise of lands to the heir, he is considered to take them in the character of devisee, and not by descent. His position as regards these lands is therefore the same as that of any other specific devisee (*t*).

Devises and
bequests
charged.

4. Lands devised charged with the payment of debts are next liable (*u*); and being equitable assets, are distributed in payment of debts *pro rata*. Moreover, if a devise of lands so charged lapses, and the heir consequently takes, this does not alter their place in the order of administration. They still rank as lands charged, and not as lands descended (*x*). Personalty bequeathed subject to a charge of debts stands in the same degree.

(*q*) *Webb v. Jones*, 2 Bro. C. C. 60; 1 Cox, 245. And see *Ashworth v. Munn*, 34 Ch. D. 391.

(*r*) *Serle v. St. Eloy*, 2 P. Wms. 386; *Phillips v. Parry*, 22 Beav. 279.

(*s*) *Davies v. Topp*, 1 Bro. C. C. 524, 527.

(*t*) S. 6, *Biedermann v. Seymour*, 3 Beav. 368.

(*u*) *Donne v. Lewis*, 2 Bro. C. C. 259; *Barnewell v. Cawdor*, 3 Mad. 453.

(*x*) *Wood v. Ordish*, 3 Sm. & G. 125; *Stead v. Hardaker*, 15 Eq. 175.

Lands charged with debts being equitable assets, the Court, in its favour of an equal distribution amongst creditors, has been inclined to give as wide a construction as possible to any passage in a will which can be considered as amounting to a charge of debts (*y*).

A mere declaration that the debts shall be paid by the executors will not, indeed, amount to a charge of debts on realty, which does not come to the hands of the executors at all. But if with such a direction real estate is devised to executors, then it is considered as charged in their hands, unless from the special circumstances of the case a contrary intention is apparent (*z*); and it is immaterial whether the executor takes the whole beneficial interest, or only a life interest, or no beneficial interest at all (*a*). If, moreover, there is a direction in general terms that debts shall be paid, not specifying by whom, and accompanied by an expressed intention to dispose of the real estate, that effectually charges devised lands (*b*). The principle is that such a general direction indicates an intention that the debts shall at all events be paid in preference to any disposition of real or personal property (*c*).

The law, statutory and otherwise, respecting the sale and disposition of charged lands is discussed elsewhere (*d*).

5. General pecuniary legacies next abate *pro rata* as far as is necessary (*e*). Annuities are equivalent to legacies, and after valuation (since the Judicature Act on the principles of bankruptcy) abate *pro rata* with them (*f*). It must be observed also that if a general legacy be given for valuable consideration, such as the relinquishment of

What
amounts
to charge.

General
legacies.

(*y*) *Silk v. Prime*, 1 Bro. C. C. 139.

(*z*) *Warren v. Davies*, 2 My. & K. 49; *Bailey v. B.*, 12 Ch. D. 268.

(*a*) *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465, 476; *Finch v. Hattersley*, 3 Russ. 345, n.; *Hartland v. Murrell*, 27 Beav. 204.

(*b*) *Shallcross v. Finden*, 3 Ves. 738.

(*c*) *Clifford v. Lewis*, 6 Madd. 38.

(*d*) See pp. 326 *et seq.*

(*e*) *Clifton v. Burt*, 1 P. Wms. 680.

(*f*) *Ward v. Gray*, 26 Beav. 491; *Miller v. Huddleston*, 3 Mac. & G. 513.

dower, or of a debt, it is entitled to priority over all merely voluntary legacies (*g*).

Specific legacies and devises.

Residuary devise specific.

6. Then specific legacies (*h*) and specifically devised real estate (*i*) not charged with debts are resorted to *pro rata*.

Under this head it is to be observed that a residuary devise is considered to be specific. While a residuary devise comprised only lands which the testator was possessed of at the date of his will, this could hardly be doubted. But it was less clear when, by the Wills Act (*k*), a will was made, in the absence of a contrary intention being manifest, to speak as from the death, and thus to include in its operation after-acquired property. After considerable conflict of opinion, it was, however, decided in *Hensman v. Fryer* (*l*) that a residuary devise was still specific; and this is now well established (*m*). In *Hensman v. Fryer* it was, indeed, further held that a residuary devisee must contribute rateably with pecuniary legatees to the payment of debts. This portion of the decision could evidently only be made consistent with the previous proposition by considering pecuniary and specific legatees and specific devisees as on the same footing. But this is opposed to a multitude of high authorities; and we accordingly find that the broad principle of *Hensman v. Fryer* has in more recent cases been applied without interference with the prior liability of pecuniary legatees, residuary and other specific devises and specific bequests being classed together next in order to pecuniary legacies (*n*).

The expressions which suffice to constitute a specific legacy are fully considered hereafter.

(*g*) *Burridge v. Bradyl*, 1 P. Wms. 126; *Davies v. Bush*, 1 Yo. 341.

(*h*) *Fielding v. Preston*, 1 De G. & J. 438.

(*i*) *Mirehouse v. Scaife*, 2 My. & Cr. 695.

(*k*) 1 Vict. c. 26, s. 24.

(*l*) 3 Ch. 420.

(*m*) *Gibbins v. Eyden*, 7 Eq. 371; *Lancefield v. Iggulden*, 10 Ch. 136.

(*n*) *Collins v. Lewis*, 8 Eq. 708; *Dugdale v. D.*, 14 Eq. 235; *Tomkins v. Colthurst*, 1 Ch. D. 626; *Farquharson v. Floyer*, 3 Ch. D. 109.

7. A widow's paraphernalia is liable (with the exception of her wearing apparel) to her husband's debts; and it would seem that this is its proper place in the order of administration (*o*). Her claim is doubtless superior to that of a pecuniary legatee (*p*), and upon principle she should be preferred to specific legatees or devisees, who are at the best but volunteers (*q*). At the same time there would be no reason for entitling her to rank higher than an appointee under a general power.

8. Lastly, real or personal property over which the testator has a general power of appointment, and over which he has actually exercised that power *by will* in favour of volunteers, is applicable (*r*); but it must be clear that the testator intended to treat the property as his own to all intents (*s*). As the creditors can only claim under the appointment, which is a voluntary act, they will have no claim unless the power is actually exercised, since equity will not interfere to aid the non-execution of a power in favour of volunteers (*t*). It must be observed, however, that a residuary gift will, under s. 27 of the Wills Act (*u*), operate as an appointment, unless a contrary intention appears. Property appointed is equitable assets, and accordingly distributable *pro rata* (*x*).

Para-phernalia.

Property appointed.

IV. *Payment of Mortgage Debts.*

It has been already remarked that these rules as to the order of the liability of assets for debts are in some degree varied when the question is respecting the payment of a

(*o*) *Tipping v. T.*, 1 P. Wms. 730.

(*p*) *Ibid.*; *Boynston v. Parkhurst*, 1 Bro. C. C. 576.

(*q*) *Tynt v. T.*, 2 P. Wms. 542.

(*r*) *Fleming v. Buchanan*, 3 De G. M. & G. 976; *Hawthorn v. Shed-*

den, 3 Sm. & G. 305; *Hinsley v. Inckeringill*, 17 Ch. D. 151.

(*s*) *Thurston v. Evans*, 32 Ch. D. 506.

(*t*) *Holms v. Coghill*, 12 Ves. 206.

(*u*) 1 Vict. c. 26.

(*x*) *Pardo v. Bingham*, 6 Eq. 485.

mortgage debt; and for convenience sake this was reserved for separate consideration. The law on this head having been revolutionised by the statute known as *Locke King's Act* (y), the inquiry naturally resolves itself into two divisions—first, as to the law applicable to cases not within that Act; secondly, as to the effect of that Act and of others which have amended, or rather added to it.

1. *Before 17 & 18 Vict. c. 113.*

Where an estate is incumbered with a mortgage, either the incumbrance must have been created by the deceased person, or the estate must have been already incumbered when it came to his hands. The question by whom the mortgage debt was incurred principally determined what fund was *primâ facie* liable to its payment. It will facilitate the inquiry to consider the two cases separately.

(1.) Where the mortgage was the debt of the deceased.

Personalty
primarily
liable.

In this case the general rule was the same with respect to mortgage debts as to others; the general personalty was first to be resorted to. Whether the mortgaged estate descended to the heir or was devised, the heir in the former case and the devisee in the latter might require the personal representative to discharge the mortgage, so that the estate might be enjoyed *sine onere*. This was the *primâ facie* presumption, and in order to avoid it, it was incumbent on the personal representative to show that there was an intention on the part of the testator that the mortgaged estate should bear its own burden (z).

Presumption,
how rebutted.

Of course, in case of an intestacy, there were no means at all of rebutting this presumption. Where there was a will it required strong expressions to do so. The strongest case for exoneration was naturally that in which the intention was manifested by express words. This requires no comment. It sufficed also if an intention was clearly implied; but the decisions show that the implication had to

(y) 17 & 18 Vict. c. 113.

(z) *Davies v. Bush*, 4 Bli. N. S. 305.

be very clear. Thus a devise of the estate for payment of debts generally, or a general charge of debts thereon, did not suffice to exonerate the personalty (*a*). Even if the devise contained the words "subject to the mortgage or incumbrance thereon," these were considered as merely descriptive, and not as showing an intention to throw the debt primarily on the mortgaged estate (*b*). A devise of the mortgaged land, however, charged with or on trust for payment of the mortgage debt, was considered sufficient to rebut the *prima facie* rule (*c*). The same was the case where there was a devise to a person of an estate, "he paying the mortgage thereon" (*d*). It will be observed how nearly these cases come to an express declaration of intention.

(2.) Where the mortgage was not the debt of the deceased.

Where the mortgage was not in its inception the personal debt of the deviser or intestate, but had been incurred by his predecessor in title, the general rule was that the mortgaged estate should itself be primarily liable to the charge; and this whether he acquired the estate already charged, or the charge was effected for some other purpose than for his benefit—for instance, to secure a portion or jointure (*e*).

Mortgaged estate primarily liable,

In order in such a case to reverse this rule, and throw the mortgage debt primarily on the personalty, it was incumbent on the heir or devisee to show that the deviser or ancestor had adopted the debt as his own (*f*). If he had, the ordinary rule applied. It was therefore a matter of great importance, and it was often a matter of great difficulty, to ascertain whether there had been an adoption of the debt. It must suffice briefly to illustrate successively

unless debt adopted by testator.

(*a*) *Hancox v. Abbey*, 11 Ves. 169, 186.

(*b*) *Serle v. St. Eloy*, 2 P. Wms. 386.

(*c*) *Evans v. Cockeram*, 1 Coll. 428.

(*d*) *Lockhart v. Hardy*, 9 Beav. 379.

(*e*) *Vandeleur v. F.*, 3 Cl. & F. 82; 9 Bl. N. S. 157; *Coventry v. C.*, 2 P. Wms. 222; 1 Str. 596.

(*f*) *Scott v. Beecher*, 5 Madd. 96.

what was and what was not considered to amount to an adoption of the debt.

What
amounted to
adoption of
debt. .

In the following cases the debt was considered to have been adopted, so that the personalty became primarily liable :—Where the owner of property mortgaged by his ancestor added thereto mortgages of his own, united them, and made himself personally liable for the payment of the aggregate sum (*g*) ; where the purchaser of an equity of redemption entered into a covenant directly with the *mortgagee* to pay him the debt, and there was a new proviso for redemption on repayment (*h*) ; where a person bought an estate, and to secure the purchase-money gave a charge on the estate and covenanted to pay it (*i*).

What not.

In the following cases it was considered that there was no adoption of the debt :—Where the deceased obtained a *small* further advance and gave an additional security for the whole sum due (*k*) ; where he entered into a covenant to pay a higher rate of interest (*l*) ; where he obtained an additional advance to pay off arrears of interest on the mortgage and the simple contract debts of the person from whom he took the estate (*m*) ; where a man bought subject to a mortgage, but had no contract or communication with the mortgagee, and showed no intention to transfer the debt from the estate to himself, beyond merely giving a necessary indemnity against the debt to the vendor (*n*). Nor was a charge of debts on his estate by an heir or devisee an adoption of the mortgage debt of the ancestor or deviser (*o*).

2. *The effect of Locke King's Act (p).*

17 & 18 Vict.
c. 113, s. 1.

By this statute it is enacted that, “ When any person shall, after the passing of the Act, die seised of or entitled

(*g*) *Townsend v. Mostyn*, 26 Beav.

72. (*h*) *Oxford v. Rodney*, 14 Ves. 417.

(*i*) *Billingham v. Walker*, 2 Bro. C. C. 608.

(*k*) *Ancaster v. Mayer*, 1 Bro. C. C. 454 ; *Swainson v. S.*, 6 De G. M. & G. 648.

(*l*) *Shafto v. S.*, 1 Cox, 207.

(*m*) *Tankerville v. Fawcett*, 1 Cox,

237. (*n*) *Woods v. Huntingford*, 3 Ves. 132.

(*o*) *Lawson v. L.*, 3 Bro. P. C. Towl. ed. 424.

(*p*) 17 & 18 Vict. c. 113.

“ to any estate or interest in any land or other heredita-
 “ ments which shall at the time of his death be charged
 “ with the payment of any sum or sums of money by way
 “ of mortgage, and such person shall not by his will or
 “ deed or other document have signified any other or con-
 “ trary intention, the heir or devisee to whom such land
 “ or hereditaments shall descend or be devised shall not be
 “ entitled to have the mortgaged debt discharged or satis-
 “ fied out of the personal estate or any other real estate of
 “ such person; but the land or hereditaments so charged
 “ shall as between the different persons claiming through
 “ or under the deceased person be primarily liable to the
 “ payment of all mortgage debts with which the same shall
 “ be charged, every part thereof according to its value
 “ bearing a proportionate part of the mortgage debts
 “ charged on the whole thereof: provided always that
 “ nothing herein contained shall affect or diminish any
 “ right of the mortgagee on such lands or hereditaments
 “ to obtain full payment or satisfaction of his mortgage
 “ debt either out of the personal estate of the person so
 “ dying as aforesaid or otherwise: provided also that
 “ nothing herein contained shall affect the rights of any
 “ person claiming under or by virtue of any will, deed or
 “ document already made or to be made before the 1st day
 “ of January, 1855 ” (g).

(1.) It is to be observed with respect to this statute, first Limits of its operation.
 that it only applies to the administration of the estates of
 persons dying on or after the 1st of January, 1855.

(2.) Secondly, that it comprehends mortgages of free-
 holds and copyholds(r), but not mortgages of leaseholds,
 these not being hereditaments(s). Of course it does not
 affect mortgages of other personalty.

(3.) It only applies to cases in which there is a definite

(g) s. 1.

(r) *Piper v. P.*, 1 J. & H. 91.

(s) *Solomon v. S.*, 10 Jur. N. S.
 331; *Hill v. Wormsley*, 4 Ch. D.
 665.

or specific charge on a specified estate (*t*), and it was held not to apply to a vendor's lien (*u*).

(4.) It applies to equitable as well as to legal mortgages (*x*).

(5.) It applies not only as between the real and personal representatives of the deceased, but also in favour of the Crown claiming the personalty for want of next of kin (*y*).

What amounts to contrary intention.

It will be seen that the general effect of the statute is to reverse the *prima facie* rule as to the fund primarily liable. Before, the personalty was first applied, unless an intention to exonerate it was manifest. Since, the mortgaged estate is first applied, unless a contrary or other intention is manifest. There has been much dispute as to what under the Act would suffice to manifest a contrary intention. In *Woolstencroft v. W.* (*z*), it was said by Lord Campbell, that "the same rule should be observed with respect to exempting the mortgaged land from payment of the mortgage money as was before observed with respect to exempting the personal estate." That was to say, "that as it was before necessary to show an intention not only to charge the realty, but also to exonerate the personalty, so under the statute it would be necessary to show the reverse intention in both respects; not only to charge the personalty, but also to exonerate the mortgaged estate." This was dissented from in *Eno v. Tatham* (*a*), where it was held, that a direction to pay the debt out of another fund was sufficient to discharge the mortgaged estate. Mere general directions for the payment of debts were not considered sufficient (*b*); but where the personal estate was bequeathed upon trust to pay (*c*), or subject

(*t*) *Hepworth v. Hill*, 30 Beav. 476.

(*u*) *Hood v. H.*, 6 W. R. 747.

(*x*) *Pembroke v. Friend*, 1 J. & H. 132.

(*y*) *Dacre v. Patrickson*, 1 Dr. & Sm. 186.

(*z*) 2 De G. F. & J. 347.

(*a*) 11 W. R. 475; 4 Giff. 181.

(*b*) *Pembroke v. Friend*, *sup.*;

Coot v. Lowndes, 10 Eq. 376.

(*c*) *Moore v. M.*, 1 De G. J. & S.

602.

to the payment of debts (*d*), the mortgaged estate was held to be exonerated.

3. *The Amendment Acts* (*e*).

In order to extend the operation of Locke King's Act, 30 & 31 Vict. c. 69, s. 1. and to set at rest the disputes which had arisen as to its construction, the statute 30 & 31 Vict. c. 69, was passed, enacting, first, that "In the construction of the will of any "person who may die after the 31st day of December, "1867, a general direction that the debts or that all the "debts of the testator shall be paid out of his personal "estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by "the said Act (*f*), unless such contrary or other intention "shall be further declared by words expressly or by necessary implication referring to all or some of the testator's "debts or debt charged by way of mortgage on any "part of his real estate" (*g*). This, it will be observed, adopts, with a slight modification, the dictum in *Woolstencroft v. W.* (*h*), already quoted; and it follows that now a mere direction to pay debts, or just debts, or any similar expression not necessarily pointing to the mortgage debts, are not sufficient to exonerate the mortgaged premises (*i*).

Secondly, it extends the operation of the Act by enacting that "in this and the previous Act the word mortgage "shall be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased "by a testator" (*k*). s. 2.

It was soon observed that this statute made no mention of the case of intestacy, and in such a case an heir-at-law was held entitled to have a lien for unpaid purchase-money discharged out of the personalty, so that he might take the Cases of intestacy omitted.

(*d*) *Mellish v. Vallins*, 2 J. & H. 194.

(*e*) 30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34.

(*f*) 17 & 18 Vict. c. 113.

(*g*) s. 1.

(*h*) *Sup.*

(*i*) *Newmarch v. Storr*, 9 Ch. D. 12; *Rossiter v. R.*, 13 *ib.* 355; *Dunlop v. D.*, 21 *ib.* 583; and see *Colston v. Roberts*, 37 Ch. D. 677.

(*k*) s. 2.

purchased estate free from incumbrance (*l*). Leaseholds, moreover, were still under the old law.

40 & 41 Vict.
c. 34.

At length, by 40 & 41 Vict. c. 34, both these defects were remedied. The previous statutes were made to apply to cases of testacy and intestacy alike, and to land or other hereditaments of whatever tenure, by which words leaseholds have been brought within the principle (*ll*).

Under the present law a direction that the personalty shall be liable before the incumbered estate must in order to be effectual unmistakeably refer to or describe the mortgage debt (*m*).

V. *The Marshalling of Assets.*

1. *As between beneficiaries.*

It was remarked, when speaking of the order of the administration of assets as regards the priorities between the respective classes of beneficiaries, that whatever their claims *inter se*, these did not in the least prejudice a creditor's rights and remedies as against any portion of the assets of the deceased. But it is clear that the order of administration would be interfered with if a creditor chose to resort to the assets in an order different from that which the law prescribes as between the beneficiaries. If, for instance, the creditor sought to recover his debt by an execution against devised lands, instead of by a personal judgment against the executor, the effect, unless counteracted by some means, would be to reduce the benefit conferred upon a specific devisee, and to increase that of the residuary legatee, whereas the law of administration distinctly prefers the former to the latter.

Principle of
marshalling.

This tendency is counteracted by the application of the

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| (<i>l</i>) <i>Harding v. H.</i> , 13 Eq. 493. | <i>Lewis v. L.</i> , 13 Eq. 219; <i>Sackville</i> |
| (<i>ll</i>) <i>Drake v. Kershaw</i> , 37 Ch. D. 674. | <i>v. Smyth</i> , 17 Eq. 153; <i>Elliott v.</i> |
| (<i>m</i>) <i>Nelson v. Page</i> , 7 Eq. 25; | <i>Dearsley</i> , 16 Ch. D. 322; <i>Hanning-</i> |
| | <i>ton v. True</i> , 33 Ch. D. 195. |

principle known as marshalling. The principle, as laid down in the leading case of

ALDRICH v. COOPER

[8 Ves. 382; 2 W. & T. L. C. 80],

is that if one person has two funds to which he may resort for the satisfaction of his demands, he shall not by his election disappoint another person who has only one fund. If, therefore, he chooses to resort to the only fund upon which the other has a claim, that other is allowed to stand in his place *pro tanto* against the fund to which otherwise he could not have resorted.

In the case we have put the creditor has an option of two, or it may be several different funds, out of either or any of which he may recover his debt. The beneficiaries have each only his own particular fund available to him, the heir the descended land, a specific legatee the property specifically bequeathed, and so on. To restore, then, the order of administration which the creditor's election has disturbed, the law permits any beneficiary who is disappointed by the creditor's actions to stand in the creditor's place as against any fund which is in the order of administration liable before his own.

It is not necessary, even if it be possible, to illustrate from cases all the possible forms of marshalling between beneficiaries which this broad principle would authorise. A few instances will serve as well as more.

We have seen that one of the last funds resorted to for the payment of debts in the order of administration is the paraphernalia of the widow. If the place ascribed to it in the last section be correct, it would follow that, with the exception of an appointee under a general power, the widow might marshal the assets as against all the other beneficiaries; in other words, if a creditor deprived her of her paraphernalia, she could claim to stand in his place to the extent of its value as against all the specific devisees and

Marshalling
for parapher-
nalia.

legatees, and *a fortiori* against others of earlier liability, such as the heir. We find instances in which she has successfully claimed to marshal against general pecuniary and even specific legatees (*n*).

For specific legatees and devisees.

Again, specific legatees and devisees, who stand on an equal footing at the head of all the beneficiaries claiming out of the testator's property, are entitled to marshal all the assets real or personal not specifically bequeathed or devised. If the creditor enforces a remedy at their expense, they can stand in his place as against every fund antecedently liable. The cases above cited to establish their position in the order of administration, apply equally here. As between themselves specific legatees and devisees (including, as we have shown, residuary devisees) have no right to marshal, their liabilities being equal (*o*).

For pecuniary legatees.

Pecuniary legatees, again, may marshal against lands devised subject to debts (*p*); *a fortiori* against lands descended to the heir (*q*).

For devisee of lands charged, &c.

Similarly a devisee of lands charged with debts may marshal against lands descended (*r*), lands devised on trust for sale for payment of debts, and the general personal estate (*r*); while the heir can only marshal as against the two last named funds (*t*), and devisee of lands devised on trust for sale to pay debts only against the general personalty.

Not only is the doctrine of marshalling applied as between beneficiaries when one or more of them has or have been disappointed by the election of a creditor; it is also utilised as between the beneficiaries themselves.

Marshalling as between

Thus if a testator charges some legacies on real estate,

(*n*) *Tipping v. T.*, 1 P. Wms. 730; *Boynton v. Parkhurst*, 1 Bro. C. C. 576; *Tynt v. T.*, 2 P. Wms. 542; *Snell*, 289.

(*o*) *Haslewood v. Pope*, 3 P. Wms. 324; *Emuss v. Smith*, 2 De G. & Sm. 722.

(*p*) *Richard v. Barrett*, 3 K. & J. 289.

(*q*) *Sproule v. Prior*, 8 Sim. 189; *Galton v. Hancock*, 2 Atk. 424.

(*r*) *Harmood v. Oglander*, 8 Ves. 106.

(*t*) *Hanby v. Roberts*, Amb. 128.

but not others, and the personal estate proves insufficient to pay them all, the legacies charged on the real estate will be thrown thereon in order to leave the personalty for the payment of the other legacies. Or if the privileged legatees choose to exhaust the personalty, the others may *pro tanto* stand in their place as against the real estate charged (*u*). The principle is clearly the same as in the previous case, the legatees whose legacies are charged on land having two funds at their disposal, the other legatees only one. beneficiaries themselves.

The doctrine of marshalling, however, will not be employed so as to alter the effect of the rules for the construction of legacies. Thus we shall see, when classifying and describing the different species of legacies, that legacies charged on land are interpreted by the rules of common law, and accordingly they fail altogether if the legatee dies before they are actually paid, while legacies not so charged are interpreted on the principles of ecclesiastical law, which considers them to vest on the death of the testator, and so to be transmissible to the legatee's representatives if he dies before payment. If, then, the legatee of a legacy charged on land dies before payment, the Court will not by means of the doctrine of marshalling throw this legacy on the personal estate so as to cause it to vest for the benefit of the legatee's representatives (*x*). When not applied.

2. *Marshalling between creditors.*

Questions of marshalling formerly arose very frequently between creditors. As long as simple contract creditors had no claim upon real assets unless charged with debts, equity compelled specialty creditors, who could resort to these assets, to seek their remedy thereout, so as to leave the personal assets for the creditors by simple contract; or if the specialty creditors exhausted the personalty the simple contract creditors were suffered to stand in their As between creditors only.

(*u*) *Hanby v. Roberts, sup.; Bonner v. B.*, 13 Ves. 379.

(*x*) *Prowse v. Abingdon*, 1 Atk. 482; *Pearce v. Loman*, 3 Ves. 135.

place against the real assets (*y*); but only to the extent to which the personalty had been applied in payment of the specialty debts. They were not entitled to have a larger fund than they had originally (*z*). These forms of marshalling are, however, no longer necessary. Neither can any question now arise as to marshalling between secured and unsecured creditors of any class, the rules of administration being now, as we have seen, regulated by those of bankruptcy.

3. *Marshalling generally.*

Limits of the principle.

It is necessary before dismissing the subject of marshalling to guard against a too comprehensive interpretation of the principle. Thus it does not apply as between creditors of different persons. If a person has a demand against A. and B. jointly and severally, a creditor of B. alone cannot compel the former creditor to apply to A. alone so as to leave the property of B. free for his separate debts, unless at least there is some equity between A. and B. themselves which would entitle B. himself to a remedy against A. (*a*). Moreover, the principle does not apply where its operation would prejudice the creditor's rights, as, for instance, where he has not an equal right over the two funds to which he may resort (*b*).

Again, there must be not only two claimants from the same person, but one of them must have two funds belonging to the same person to which he can resort. Thus, a legatee in a will of a tenant in tail of lands could not throw judgment creditors exclusively on those lands in exoneration of the general assets, since the lands belong to the heir, and are subject to debts only by virtue of statute (*c*).

Again, we have elsewhere seen that the Court will not marshal assets in favour of charities. Thus, if real and

Marshalling not applied for charities.

(*y*) *Sagitary v. Hyde*, 1 Vern. 455.

(*z*) *Cradock v. Piper*, 15 Sim. 301.

(*a*) *Exp. Kendall*, 17 Ves. 520.

(*b*) *Webb v. Smith*, 30 Ch. D. 192.

(*c*) *Douglas v. Cooksey*, 2 I. R. Eq. 311; see also *In re International, &c. Soc.*, 2 Ch. D. 476.

personal estate, including chattels real, are given on trust to sell for the payment of debts and legacies, and the residue is bequeathed to a charity, the debts and ordinary legacies will not be thrown on the proceeds of land so as to leave the pure personalty for the charity (*d*). The same rule applies in the case of a simple pecuniary legacy (*e*). But this rule does not in the least prevent the testator from himself producing the effect of marshalling by directing the payment of his charitable legacies to be made out of pure personalty (*f*), and such a direction will be carried into effect by allowing, if necessary, the charities to stand against realty in the place of creditors who have exhausted the pure personalty (*g*).

VI. *Marshalling Securities.*

The doctrine of marshalling is not confined to the administration of assets, and though not strictly *à propos* to the present subject, this is a convenient place in which to refer to its application as between the creditors of living persons. Upon the same principle, that where one person has two funds to resort to, and another has only one, the former shall not disappoint the latter by depriving him of his only resource, it has been laid down that if a person who has two real estates mortgages both to one mortgagee, and afterwards only one estate to a second mortgagee, the Court will direct the first to take his satisfaction in the first place out of that estate which is not in mortgage to the second mortgagee, so as to leave the second estate, or as much of it as is not required to complete the satisfaction of

Marshalling
securities.

(*d*) *Mogg v. Hodges*, 2 Ves. sr. 52.

37 Ch. D. 637.

(*e*) *Ridges v. Morrison*, 1 Cox, 180; *Cherry v. Mott*, 1 My. & Cr. 123.

(*g*) *Att.-Gen. v. Mountmorris*, 1 Dick. 379; *Miles v. Harrison*, 9 Ch. 316; and see *Broadbent v. Barrow*, 31 Ch. D. 113.

(*f*) *Robinson v. Geldard*, 3 Mac. & G. 735; *Ravenscroft v. Workman*,

the first, for the second mortgagee (*h*) ; and it is immaterial whether the second mortgagee has or has not notice of the first mortgage (*i*). So if one of the estates is subject to a portion, the person entitled to the portion may require the mortgagee to resort to the other estate, or, if he does not, may stand in his place against it (*k*) ; and the principle has been applied even in favour of a voluntary settlement (*l*).

Not to the
prejudice of
third persons.

Securities will not, however, be marshalled to the prejudice of third parties. For instance, if there is first a mortgage of A. and B., and then a mortgage of B. only, and then another mortgage of A. and B. to a third mortgagee without notice of the second mortgage, the securities will not be marshalled against the last mortgagee (*m*). *Secus*, if he had notice at the time of his advance (*n*).

The principle is applied also in Admiralty cases—for instance, where one person has a bond on a ship, freight and cargo, and another only on the ship and freight, the former will be required to resort primarily to the cargo, or else the latter will be allowed to stand in his place against it (*o*).

- (*h*) *Lanoy v. Athol*, 2 Atk. 446.
- (*i*) *Hughes v. Williams*, 3 Mac. & G. 690 ; *Tidd v. Lister*, 10 Ha. 157 ; 3 De G. M. & G. 857.
- (*k*) *Rancliffe v. Parkyns*, 6 Dow, 216.
- (*l*) *Hales v. Cox*, 32 Beav. 118 ;

- and see *Exp. Alston*, 4 Ch. 168 ; *Exp. Salting*, 25 Ch. D. 148.
- (*m*) *Barnes v. Racster*, 1 Y. & C. Ch. 401.
- (*n*) *Re Mower's Trust*, 8 Eq. 110.
- (*o*) *The Trident*, 1 W. Rob. 29 ; *The Arab*, 5 Jur. N. S. 417.

SECTION II.—MATTERS RELATIVE TO ADMINISTRATION.

I. *Legacies.*1. *Specific Legacies.*

- (1.) *Effect of Wills Act (1 Vict. c. 26).*
- (2.) *What constitutes a Specific Legacy.*
- (3.) *Generally.*
- (4.) *Ademption.*

2. *Demonstrative Legacies.*3. *Time of Payment and Interest.*II. *Donationes Mortis Causâ.*1. *Conditions of.*2. *Place in Administration.*I. *Legacies.*

Under the head of Administration of Assets, it was necessary to classify the different species of beneficial interests which might be bestowed by a testator. From this classification, we are led to a further inquiry respecting the different modes in which legacies may be bestowed, in order to ascertain the particular characteristics of the several species. Questions of this nature continually arise on the construction of wills for the purposes of administration, and it is therefore advisable to review the consequences of the leading distinctions between the various forms of legacies, notwithstanding that it is a matter which would strictly come under the head of conveyancing rather than that of equitable jurisprudence.

Legacies are either general, demonstrative, or specific.

A general legacy is one which does not relate to any individual thing, or sum of money, as distinct from other

Legacies—
classified,
defined,

things of the same kind or other moneys: for instance, a bequest of "a horse," of one thousand pounds, or one thousand pounds stock. Such legacies are referred to in the Wills Act (*p*) as "bequests of personal property described in a general manner."

A demonstrative legacy is one in which, together with words of general description, such as would create a general legacy, are used additional words pointing out a particular fund out of which it is to be satisfied: for instance, a bequest of "one thousand pounds out of my East India Stock."

A specific legacy is a bequest of a particular thing or sum of money as distinguished from all others of its kind—for instance, a bequest of "my horse Dobbin," "the five hundred pounds contained in my safe," or "the debt owing to me by B."

and com-
pared.

These distinctions are of great importance. As we have seen, in the administration of assets, the order of the application of a legacy depends upon whether it is considered to be general or specific; so that upon the construction put upon it in this respect, the question as to whether the legatee shall enjoy it or not may wholly rest. In this instance the position of a specific legatee is more advantageous than that of a person whose legacy is general. But in another respect the contrary is the case. Thus, if after a testator has given a specific legacy, the thing specifically given ceases to exist, or ceases to belong to the testator, the legacy is considered to be adeemed; the legatee entirely loses the benefit of it, and cannot claim compensation out of the general estate. We shall presently inquire more precisely what will suffice to effect an ademption. A general legacy, on the contrary, is not liable to ademption. It is payable out of any and every part of the assets not required for payment of debts, and not specifically disposed of; and all general legacies, in the

(*p*) s. 27.

case of an insufficiency of assets, are payable *pari passu*, unless the testator has given to some a priority over others (*q*).

1. *Specific legacies.*

(1.) Before proceeding to consider in detail the different kinds of legacies, it is necessary to point out that the character of specific legacies has to some extent been modified by the Wills Act (*r*). Previously to that enactment, a will was deemed to speak, as far as concerned the property to which it related, as from the time at which it was made. When, therefore, a testator made use of such an expression as "my stock," or "my horses at B.," there could be little doubt as to what his words referred to, and such legacies were then always considered as specific (*s*). But by s. 24 of the above statute every will is to be construed, "with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator." Now, therefore, when the same expressions are used, in order to treat them as specific, we must consider the testator's intention to have referred to a future state of things. On the ground that this was not an admissible supposition, it was held by some judges that some stronger indication than the mere use of a personal pronoun was required under the new law to impress the legacy with a specific character (*t*). On the contrary, however, it has been pointed out that previous to the Wills Act, it was open to a testator to make his legacy act specifically as from his death by means of such an expression as "all the furniture which I shall be possessed of at my death," and that the effect of the Act has been to import such a clause into all wills. It has been held by high authority that there is nothing unreasonable in this, and it may be considered as established that the same words will suffice

Before the
Wills Act.

Effect of the
Act.

(*q*) *Wells v. Borwick*, 17 Ch. D. 798.

(*r*) 1 Vict. c. 26.

(*s*) *Kirby v. Potter*, 4 Ves. 748.

(*t*) *Goodlad v. Burnet*, 1 K. & J. 341.

now as did formerly, to effect a specific legacy (*u*). It is true that these decisions confer upon the term specific legacy a somewhat broader meaning than it formerly had. Formerly a legacy was, in the absence of express words postponing its application until the time of death, only specific when it necessarily operated, if at all, upon some definite and certain object, and it was liable to be adeemed by any alienation of that object, or any substitution of another for it, subsequent to the date of the will. Now the general rule is the other way. Unless there is some indication of intention that the legacy shall apply only to an object belonging to the testator at the time of the will, the legacy becomes, in fact, rather generic than specific. When it comes to be carried into effect, it may happen to apply to some object which was not at all within the contemplation of the testator at the time that he made his will, but which was subsequently acquired by him, either in addition to or in substitution for objects of the same *genus* which he had at the time of the will. Though such a legacy may, of course, fail, owing to there being no property answering to it at the time of the death, it is not liable to ademption in the same manner in which specific legacies formerly were, since from the time at which it is applied, there can be no dealing with the property which will affect it. The cases cited, however, show that this alteration of the character of the legacies does not prevent legacies which were formerly considered specific from being still treated as such.

But there is a distinction to be observed between such generic legacies and a legacy which was manifestly intended to refer to a distinct and particular object. If a testator uses such words as "my stock," or "my shares," or "my horses at B.," he may well be supposed to have meant such stock, shares, or horses as he should be possessed

(*u*) *Langdale v. Briggs*, 8 De G. M. & G. 391; *Bothamley v. Sherson*, 20 Eq. 304.

of at his death. But if he bequeaths a distinct object, such as his "horse Dobbin," or his "shares in the A. Company," his intention clearly refers not to a *genus*, but to a certain particular thing; and if, after making such a bequest, he parts with that thing, the mere fact that before his death he acquires another of the same kind which happens to be called by the same name will not prevent the legacy from being adeemed by the alienation. In such a case there is considered to be a sufficient indication of contrary intention to prevent s. 24 of the Wills Act from saving the legacy (*x*).

(2.) *What constitutes a specific legacy.*

In considering what expressions are considered to give rise to a specific legacy, it will be convenient to distinguish between the different classes of objects which may be comprised in a specific bequest.

Specific legacies of valuable articles (in which money is not here included) require but little exposition. There can be rarely any question about a clause which bequeaths a horse, or a piece of furniture, or jewellery definitely to a given person. Such a bequest may evidently be for life only or absolutely. It will, however, be construed as absolute, unless expressly limited to a life interest. In the case of things *quæ usu consumuntur*, the nature of the gift generally prevents a gift over from following a life interest, and even if it be expressed to be for life, or for a limited period, it will be construed as absolute (*y*). When such articles constitute the testator's stock in trade, the case is different; here there is no inconsistency in directing successive interests, and such a direction will be carried into effect (*z*). The distinction must also be observed between a specific and a residuary bequest of such things. In the latter case, if there are successive interests, they will be

Articles of
value.

(*x*) *Re Gibson*, 2 Eq. 669; *Dresser v. Gray*, 36 Ch. D. 206; *Re Portal and Lamb*, 30 Ch. D. 50; 27 *ib.* 600.

(*y*) *Randall v. Russell*, 3 Mer. 195.

(*z*) *Phillips v. Beal*, 32 Beav. 25.

protected by a sale of the articles and payment of the interest of the proceeds to the persons successively entitled (*a*). It has, moreover, been held that where the same clause includes a bequest of particular articles, and a gift of the residue, the whole clause will be considered as residuary, and not as specific. Thus, a gift of "all my horses and other personal estate" is deemed residuary (*b*); and so, also, where the particular expression came last; *e. g.*, a gift of "all my personal property, together with all my furniture, &c." (*c*); and a gift of "all my personal estate and effects of which I shall die possessed, which shall not consist of money or securities for money," is still more clearly residuary, and not specific (*d*).

Money.

A bequest of a sum of money in a certain bag (*e*), or in the hands of a certain person (*f*), is specific. A bequest even of "all my moneys" has been so considered (*g*). But a bequest of a sum of money, followed by a direction as to its application, *e. g.*, "to purchase a ring," or "an annuity," or "government securities," is general (*h*); as is also a bequest of money "to be paid in cash" (*i*).

Debts.

A debt due to the testator may be specifically bequeathed; and this may be effected either by a description of the sum owing, *e. g.*, a bequest of "the money due on A.'s bond" (*k*), or "the money now owing to me from A." (*l*), or by a specific gift of the security itself, as of "my note of £500" (*m*). And the bequest may be specifically made for life only, as well as absolutely (*n*). In the case, again, of a bequest of part of a debt to one person, and the

(*a*) *Howe v. Id. Dartmouth*, 7 Ves. 137, *sup.* p. 109.

(*b*) *Fielding v. Preston*, 1 De G. & J. 438.

(*c*) *Fuirer v. Park*, 3 Ch. D. 309.

(*d*) *Robertson v. Broadbent*, 8 App. C. 872; 20 Ch. D. 676.

(*e*) *Lawson v. Stitch*, 1 Atk. 508.

(*f*) *Hinton v. Priske*, 1 P. Wms. 540.

(*g*) *Manning v. Purcell*, 2 Sm. & G. 284; 7 De G. M. & G. 55.

(*h*) *Apreece v. A.*, 1 V. & B. 364; *Hume v. Edwards*, 3 Atk. 693; *Gibbons v. Hills*, 1 Dick. 324.

(*i*) *Richards v. R.*, 9 Pri. 226.

(*k*) *Davies v. Morgan*, 1 Beav. 405.

(*l*) *Ellis v. Walker*, Amb. 309.

(*m*) *Drinkwater v. Falconer*, 2 Ves. sr. 623.

(*n*) *Ashburner v. Macquire*, 2 Bro.

C. C. 108.

“remainder,” or “residue” to another, both legacies are specific (*o*).

A bequest of stock, or government securities described Stock. as “my stock,” or “my securities,” is specific, or (since the Wills Act), perhaps, more strictly speaking, generic in character, but specific in effect (*p*). A legacy, also, of so much, “part of my stock,” has been considered as specific (*q*). A bequest of a sum of money out of stock is, on the contrary, demonstrative (*r*). If a legacy is expressed in general terms to be of so much stock, &c., instead of as so much money, it will not be deemed specific merely because the testator happens to have stock, &c., of a corresponding description, since his intention might have been that his executor should purchase such stocks out of his general personalty (*s*); but where there was a bequest of named stock in general terms, and coupled with it a direction for a sale of it, and the testator possessed some of the stock named, it was held that a specific bequest must have been intended (*t*).

A bequest of a lease, or of a rent out of a term of Chattels real. years, is specific (*u*). On the contrary, a gift not of an annual, but of a gross sum, payable out of a term, or out of real estate, is demonstrative (*x*). And, again, this must be distinguished from a mere direction to pay a legacy out of a particular fund or estate: in this case the fund or land alone is liable (*y*). There may, also, be a specific gift of the proceeds of sale of land, whether freehold or leasehold (*z*).

(*o*) *Ford v. Fleming*, 2 P. Wms. 469.

(*p*) *Barton v. Cooke*, 5 Ves. 461; *Bothamley v. Sherson*, 20 Eq. 304.

(*q*) *Kirby v. Potter*, 4 Ves. 750.

(*r*) *Ibid.*; *Deane v. Teste*, 6 Ves. 146, 152.

(*s*) *Partridge v. P.*, ca. t. Talb. 226; *Purse v. Snaplin*, 1 Atk. 415; *Dresser v. Gray*, 36 Ch. D. 205.

(*t*) *Ashton v. A.*, 3 P. Wms. 384.

(*u*) *Long v. Short*, 1 P. Wms. 403.

(*x*) *Savile v. Blakett*, 1 P. Wms. 778.

(*y*) *Spurway v. Glynn*, 9 Ves. 483.

(*z*) *Page v. Leapingwell*, 18 Ves. 463; *Walker v. Laxton*, 1 Y. & J. 557.

(3.) *General characteristics.*

Specific
legacy carries
everything
incident to it,
benefits

A gift of a specific legacy carries with it everything incident to the subject-matter of the gift; such, for instance, as bonuses declared after the testator's death upon shares specifically bequeathed (*a*). Bonuses declared in his lifetime, but payable after his death, do not, however, go to the legatee (*b*). Dividends, also, declared after his death, are considered as income, and go to the legatee, notwithstanding that they may have been earned in the testator's lifetime (*c*).

and liabilities.

Conversely, liabilities attaching to the subject-matter of the gift, if arising after the testator's death, are payable by the specific legatee (*d*). But payments necessary to complete the testator's interests in the subject-matter of the gift must be distinguished from such liabilities. Such payments are, in the absence of an indication of a contrary intention, payable out of the general personal estate (*e*).

When there is an apparently specific bequest, parol evidence is admissible to show what property there is answering to the description of it (*f*), and generally to determine whether a legacy is general or specific (*g*).

(4.) *Ademption of specific legacies.*

Two uses of
the word
"ademption."

In speaking of the ademption of specific legacies it is necessary to distinguish between this matter and the ademption of general legacies to children, &c., by portions or subsequent gifts given in satisfaction thereof during the testator's lifetime. The term ademption is indeed applied in both cases; but that there is a marked distinction between the two is sufficiently obvious. In the latter sense many general legacies are liable to ademption, and the

(*a*) *Maclaren v. Stainton*, 3 De G. F. & J. 202.

(*b*) *Lock v. Venables*, 27 Beav. 598; *De Gendre v. Kent*, 4 Eq. 283.

(*c*) *Bates v. Mackinley*, 31 Beav. 280.

(*d*) *Adams v. Fenrick*, 26 Beav. 384.

(*e*) *Armstrong v. Burnet*, 20 Beav. 424.

(*f*) *Horwood v. Griffith*, 4 De G. M. & G. 700.

(*g*) *Att.-G. v. Grote*, 2 R. & M. 690.

principle rests on the presumed intention of the testator (*i*). In the case of the ademption of specific legacies, on the contrary, the intention or *animus adimendi* is immaterial (*k*).

The most conclusive form of the ademption of a specific legacy is where the thing expressed to be specifically bequeathed ceases to be in existence before the testator's death; if, for instance, a house specifically bequeathed has been destroyed by fire, or a policy of assurance has been suffered to lapse (*k*). In the former case, notwithstanding that the house may have been insured, the specific bequest will not operate upon the insurance money, which will fall into the residuary estate (*l*). Similarly, if a debt is specifically bequeathed, and is afterwards received by the testator in his lifetime, the bequest is adeemed (*m*), and this notwithstanding that the money when received is again laid out in a similar manner; as, for instance, when a mortgage debt is paid off, and the money again invested on mortgage (*n*). And it makes no difference whether the debt is paid voluntarily or compulsorily (*o*). Non-existence of subject-matter.

Ademption may, moreover, be occasioned by less conclusive changes in the property than these. Thus, a specific legacy of goods, described as being in a particular place, will be adeemed by their removal to another place (*p*), unless the removal is only temporary or accidental; as, for instance, for purposes of repair, or by reason of a fire (*q*). Removal is of no effect unless the words of the bequest have evident reference to a given locality (*r*). Removal of subject-matter.

Again, where stock which has been specifically bequeathed has been subsequently sold out by the testator, Change of form.

(*i*) See *Exp. Pye*, 18 Ves. 140.

(*k*) *Stanley v. Potter*, 2 Cox, 182.

(*l*) *Durham v. Friend*, 5 De G. & Sm. 343.

(*m*) *Rider v. Wager*, 2 P. Wms. 329; *Barker v. Rayner*, 5 Madd. 208; 2 Russ. 122.

(*n*) *Gardner v. Hatton*, 6 Sim. 93.

(*o*) *Ashburner v. Macquive*, 2 Bro.

C. C. 108; *Stanley v. Potter*, *sup.*

(*p*) *Green v. Symonds*, 1 Bro. C. C. 129, n.

(*q*) *Brooke v. Warwick*, 2 De G. & Sm. 425; *Chapman v. Hart*, 1 Ves. sr. 271; *Rawlinson v. R.*, 3 Ch. D. 302.

(*r*) *Norris v. N.*, 2 Coll. 719.

the bequest is thereby adeemed (*s*); and this will be the case even if the money realised is again laid out in similar stock (*t*). A mere change in the name or form of the stock—for instance, by a parliamentary conversion—will not, however, cause an ademption (*u*), nor will a transfer thereof from trustees to the testator (*x*).

Ademption, moreover, will not be effected by any dealing with the stock unknown to the testator or without his authority (*y*). So if he becomes insane, the dealings of others with his property will not as a rule be suffered to affect bequests which he may have made (*z*). But a sale of personalty by order of *the Court in Lunacy*, without any reservation of the rights of legatees, has been held to effect an ademption of a specific bequest (*a*).

2. *Demonstrative legacies.*

Characteristics.

A demonstrative legacy so far resembles a specific legacy that it will not abate with the general legacies until the fund out of which it is payable is exhausted; it so far resembles a general legacy that it will not be liable to ademption by the alienation or non-existence of the property indicated for its payment. It is considered that the primary object is the gift of the legacy, the indication of the particular fund being a matter subsidiary or directory, and not of the essence of the gift (*b*). The testator may, nevertheless, show such an intention that a legacy shall be paid out of one fund only, as to effectually make its payment conditional upon the existence of that fund (*c*).

Legacies only apparently demonstrative.

Attention must be called to some cases in which a legacy apparently demonstrative is in effect specific. A bequest

(*s*) *Lee v. L.*, 27 L. J. Ch. 824.
 (*t*) *In re Gibson*, 2 Eq. 669;
Luard v. Lane, 14 Ch. D. 856; but
 see *Re Johnstone's Settlement*, *ib.*
 162.
 (*u*) *Partridge v. P.*, ca. t. Talb.
 226.
 (*x*) *Dingwell v. Askew*, 1 Cox, 427.
 (*y*) *Shaftesbury v. S.*, 2 Vern. 747,
 748, n. 2; *Basan v. Brandon*, 8 Sim.

171.
 (*z*) *Taylor v. T.*, 10 Ha. 475.
 (*a*) *Jones v. Green*, 5 Eq. 555;
Freer v. F., 22 Ch. D. 622.
 (*b*) *Savile v. Blacket*, 1 P. Wms.
 777; *Pickers v. Pound*, 6 H. L.
 885.
 (*c*) *Coard v. Holderness*, 22 Beav.
 391.

of money out of stock, as of “£1,000 out of my Three per Cents.,” is demonstrative; but, as we have seen, a bequest of “£1,000 stock, part of my Three per Cent. stock,” is deemed to be specific (*d*); and similarly, a bequest of one article or more out of a number of the same kind is specific, and gives the legatee a right to select (*e*).

3. *Time of payment of legacies, and interest.*

There are also important distinctions between the different kinds of legacies as regards the time at which they are payable, from which time interest runs thereon.

Specific legacies are payable and interest runs thereon from the death of the testator, from which time also, as we have seen, dividends accrue to the legatee (*f*). The case of a specific bequest of a reversionary interest is evidently an exception, there being no claim then until the reversion falls into possession. Specific legacies.

General legacies, on the contrary, are not, unless the testator expressly fixes a time for their payment, payable until the expiration of twelve months after his decease, and accordingly, as a rule, they only carry interest from that time (*g*). But the testator may by expressed intention accelerate or postpone their payment (*h*), and in these cases interest is payable from the directed time of payment (*i*). General legacies.

There are some exceptions to this rule. Thus, where a legacy is given in satisfaction for a debt, it is payable at and carries interest from the death (*k*). And where a parent, or person *in loco parentis*, bestows a legacy upon an infant, the Court will generally give interest from the death by way of maintenance (*l*). But where a separate fund for maintenance is provided, the case is taken out of Exceptional cases.

(*d*) *Kirby v. Potter*, 4 Ves. 748.

(*e*) *Richards v. R.*, 9 Pri. 219;

Jacques v. Chambers, 2 Coll. 435.

(*f*) *Barrington v. Tristram*, 6 Ves. 345; *Bristow v. B.*, 5 Beav. 289.

(*g*) *Child v. Elsworth*, 2 De G. M. & G. 679; *Wood v. Penoyre*, 13 Ves. 333.

(*h*) *Re Tinkler's Estate*, 20 Eq.

456; *Lord v. L.*, 2 Ch. 782.

(*i*) *Londesborough v. Somerville*, 19 Beav. 295.

(*k*) *Clark v. Sewell*, 3 Atk. 99.

(*l*) *Beckford v. Tobin*, 1 Ves. sr. 310; *Wilson v. Maddison*, 2 Y. & C. Ch. 372.

the exception, and falls within the general rule (*m*); and so where the child is adult (*n*). A legacy charged upon real property is also payable at the testator's death, and from that time interest runs (*o*); but not so where real property is devised upon trust for conversion and payment of legacies out of the proceeds; in this case the general rule applies (*p*). The distinction seems to be based on the general principle elsewhere observed (p. 178), that whereas purely personal legacies follow the rules of civil law, as expounded by the ecclesiastical courts, legacies charged on land are treated according to the doctrines of the common law.

Demonstrative legacies.

A demonstrative legacy, as regards the time of payment and the accrual of interest, resembles a general and not a specific legacy (*q*).

Rate of interest.

The rate of interest usually charged is four per cent. (*r*), and compound interest will not be paid unless directed by the will (*s*), or there is a breach of trust by the executor (*t*).

II. *Donationes Mortis Causâ.*

Definition.

English equity has derived from the Roman law a mode of disposition intermediate in character between a specific legacy and a gift *inter vivos*, namely, the *donatio mortis causâ*, and in doing so it has in the main also adopted the principles by which these gifts were regulated by Roman law. The purpose of a definition of the *donatio mortis causâ* is best served by stating the necessary conditions of such a gift. In doing so we shall indicate its character fully, by pointing out in what respects it resembles, and in what it

(*m*) *Re Rouse's Estate*, 9 Ha. 649.

(*n*) *Raven v. Waite*, 1 Swanst.

553.

(*o*) *Maxwell v. Wettenhall*, 2 P.

Wms. 26.

(*p*) *Turner v. Buck*, 18 Eq. 301;

Whittaker v. W., 21 Ch. D. 657.

(*q*) *Mullins v. Smith*, 1 Dr. & S.

210, *per* Kindersley, V.-C.

(*r*) *Wood v. Briant*, 2 Atk. 523.

(*s*) *Arnold v. A.*, 2 My. & K. 365.

(*t*) *Raphael v. Boehm*, 11 Ves. 92;

13 *ib.* 590.

differs from a legacy on the one hand, and a gift *inter vivos* on the other.

1. *Conditions of donatio mortis causâ.*

(1.) As in Roman law, so in English, a *donatio mortis causâ* is only valid when made in near contemplation of death (*u*). It is not, it seems, necessary for the donor absolutely to express the gift to be made in close expectation of death; this may be presumed from the circumstances of the case, if the donor is evidently and to his own knowledge near death (*x*).

Must be made in view of death.

This condition is evidently implied in the name itself, and it distinguishes the *donatio mortis causâ* from both a legacy and a gift *inter vivos*.

(2.) The gift must be conditioned to take complete effect only after the donor's death (*y*); but in this case, as before, the condition need not be expressly declared. If the gift is made in evident contemplation of death, the law will imply an intention that it is to be absolute only in the event of death (*z*).

Must be complete only at death.

There were two modes of *donatio mortis causâ* recognised at Rome; in one, the subject of the gift was given on condition that it should become the property of the donee in the event of the donor's death; in the other, the subject of the gift became at once the property of the donee, but on condition that he should return it to the donor in the event of his recovery. English equity recognises only the former of these modes, a gift under a suspensive condition. Such a gift is in this respect analogous to a legacy, being revocable during the donor's life, and is accordingly contrasted with a *donatio inter vivos*.

Contrast in Roman law.

(3.) The gift must be completed by a delivery of the subject-matter thereof (*a*). But in the application of this

Delivery necessary.

(*u*) Inst. II., 7, 1; *Duffield v. Elwes*, 1 Bli. N. S. 530; *Edwards v. Jones*, 1 My. & Cr. 233.

(*y*) *Edwards v. Jones*, *sup.*

(*z*) *Gardner v. Parker*, 3 Madd. 184.

(*x*) *Miller v. M.*, 3 P. Wms. 356; *Lawson v. L.*, 1 P. Wms. 441.

(*a*) *Tate v. Hilbert*, 2 Ves. jr. 120; 4 Bro. C. C. 286.

rule, it must be observed that a clear constructive delivery is deemed tantamount to actual delivery. Thus, delivery to an agent of the donee or to some one on his behalf will suffice (*b*). So, also, will a delivery by an agent of the donor at the donor's request; but not a delivery by the donor to his own agent (*c*). Again, a delivery by symbol is equivalent to an actual delivery; thus, for instance, the delivery of the key of a box with intent to give the contents is equivalent to a delivery of its contents (*d*); but such a delivery must be distinguished from that of the delivery of a key to a person for some other purpose, as to a housekeeper, for the purpose of safe custody (*e*). The case of negotiable instruments, which are in some sense symbols of choses in action, rests on a different principle, which will be presently considered.

Property
incapable of
being given
mortis causâ.

In this respect a *donatio mortis causâ* is contrasted both with a legacy and with a gift *inter vivos*, which may be effected by deed without delivery. A peculiar effect of this condition, acting in connexion with the equally essential condition that the gift is to take effect absolutely only in case of death, has been to render some kinds of property seemingly incapable of being the subject of a *donatio mortis causâ*. A chose in action may, indeed, be generally effectually given by the delivery of the means of its enforcement; thus, a bond (*f*), a mortgage deed (*g*), a promissory note or cheque payable to the donor or his order, though not indorsed (*h*), and other similar instruments (*i*), may be transferred by *donatio mortis causâ*. But it has been considered that the donor's cheque cannot be validly so given, a cheque being nothing more than an

Cheque, &c.

(*b*) *Moore v. Darton*, 4 De G. & Sm. 517.

(*c*) *Farquharson v. Cave*, 2 Coll. 356, 367.

(*d*) *Jones v. Selby*, Prec. Ch. 300.

(*e*) *Trimmer v. Danby*, 25 L. J. Ch. 424.

(*f*) *Snelgrove v. Bailey*, 2 Atk.

214.

(*g*) *Duffield v. Elwes*, 1 Bli. N. S. 497.

(*h*) *Veal v. F.*, 27 Beav. 303; *Austin v. Read*, 15 Ch. D. 651;

Clement v. Cheesman, 27 ib. 631.

(*i*) *Moore v. Darton*, *sup.*; *Amis v. Pitt*, 33 Beav. 619.

order for the delivery of a certain sum of money, which order is revoked by the death of the drawer. The argument would be that a cheque is not itself a delivery of the money, and that from its nature it cannot be made conditional on death (*k*). On similar reasoning, it has been held that a delivery of receipts for annuities (*l*), or of railway scrip (*m*), will not effect a *donatio mortis causâ*.

Where a cheque given is in fact actually negotiated before the death, the gift has been held to be complete and effectual (*n*), but in that case it would seem that the feature of revocability which is essential to *donationes mortis causâ* is wanting, and that, therefore, if such a gift is sustainable at all it must be rather as a transaction *inter viros* than as one of the class we are now considering.

A *donatio mortis causâ* may not only be given absolutely, but may be made subject to a trust for a third person (*o*), or coupled with a trust for some particular purpose, or charged with a condition (*p*). Trust created.

(4.) When speaking of voluntary gifts *inter viros* (*q*), it was pointed out that it was open to a donor to confer a benefit either by a direct transfer of his property, or by the creation of a trust in favour of the intended beneficiary, and it was seen that an imperfect attempt to effect a direct gift would not be assisted by considering it as a declaration of trust. A similar principle applies to *donationes mortis causâ*. Imperfect
donationes
mortis causâ. The donor may if he chooses bequeath his property by a testamentary instrument, or he may in most cases bestow it by a *donatio mortis causâ*. If he chooses to adopt the former method the law imposes on him certain conditions, compliance with which is necessary to the validity of the bequest. Thus, there must be a written

(*k*) *Tate v. Hilbert*, 2 Ves. jr. 120;
Hewitt v. Kaye, 6 Eq. 198; *Re*
Beak's Estate, 13 Eq. 489; *Austin*
v. Read, *sup.*

(*l*) *Ward v. Turner*, 2 Ves. sr.
431.

(*m*) *Moore v. M.*, 18 Eq. 474.

(*n*) *Rolls v. Pearce*, 5 Ch. D. 730.

(*o*) *Drury v. Smith*, 1 P. Wms.
405.

(*p*) *Blount v. Barrow*, 4 Bro.
C. C. 71; *Hills v. H.*, 8 M. & W.
401.

(*q*) *Sup.* p. 52.

instrument duly witnessed and in all respects conformable to the Wills Act (*v*). If, on the contrary, he elects to make a *donatio mortis causâ*, the Wills Act indeed will not affect him (*s*), but he must comply with the conditions above laid down; particularly, he must deliver the property to the donee or to some one for him. But as in the case of a gift *inter vivos*, so in this case, his attempts to bestow his property will be futile unless they amount to one or other of these alternatives. An attempt to make a *donatio mortis causâ* which is defective from there being no delivery of the property, will not be suffered to take effect as a will. However clear the intention may be, and whether expressed by parol or in writing, unless it complies with the Wills Act so as in fact to be an actual testamentary instrument, it will not be enforced (*t*). On the other hand, if the donor clearly intends to make a testamentary gift, but omits the necessary formalities, his intention will not be carried into effect by treating his attempt as a *donatio mortis causâ*, even though there may have been an actual delivery (*u*).

It has, indeed, been sought to aid a donee by setting up an instrument as a declaration of trust, which is clearly void for informality as a will (*x*). But it is clear, both on principle and on authority, that such an attempt cannot succeed. We have seen this decidedly established as regards an instrument purporting to confer a benefit *inter vivos* (*y*), and the principle is the same in the case of *donatio mortis causâ* (*z*).

Again, the same principle prevents an ineffectual attempt to make a gift *inter vivos* from being supported as a valid *donatio mortis causâ*. The two things are quite distinct,

(*r*) 1 Vict. c. 26.

(*s*) *Moore v. Darton*, 4 De G. & S. 519.

(*t*) *Rigden v. Vallier*, 2 Ves. sr. 258; *Tate v. Hilbert*, 2 Ves. jr. 120.

(*u*) *Mitchell v. Smith*, 12 W. R. 941.

(*x*) *Morgan v. Malleon*, 10 Eq. 475.

(*y*) *Sup.* p. 52; *Milroy v. Lord*, 4 De G. F. & J. 264.

(*z*) *Warriner v. W.*, 16 Eq. 340; *Richards v. Delbridge*, 18 Eq. 11.

and an intention to do the former by no means implies an intention in the alternative to do the latter. On the contrary, it has been laid down that the former intention is quite inconsistent with the latter (*a*).

2. *Place in administration.*

For the purposes of administration a *donatio mortis causá* is treated in some respects as a legacy. It is true that, being given to vest absolutely in the donee at the death of the donor, the donee's title does not, like that of a legatee, require the assent of the executor or administrator. Nevertheless, on a deficiency of assets, the subject of the gift is liable, like a legacy, to the debts of the deceased (*b*). If this be so, it is clear that it can only be reached by the authority of the Court, which would, we submit, be exercised only in favour of creditors, so that in the order of administration the subject of a *donatio mortis causá* would be the last of the assets resorted to. It is, however, by statute, subject to legacy duty (*c*), and to probate duty (*d*).

How far
resembling a
legacy.

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| (<i>a</i>) <i>Edwards v. Jones</i> , 1 My. & Cr. | 406, cited. |
| 226. | (<i>c</i>) 8 & 9 Vict. c. 76. |
| (<i>b</i>) <i>Smith v. Casen</i> , 1 P. Wms. | (<i>d</i>) 44 & 45 Vict. c. 12, s. 38. |

CHAPTER III.

PARTNERSHIP.

*Grounds of Jurisdiction.*I. *Equity as affecting the Nature and Formation of Partnership.*

COX v. HICKMAN.

II. *Equity as affecting the Partnership Property.*III. *Equity as affecting the Rights of Partners inter se.*IV. *Equity as affecting the Relation of Partners to Third Persons.*V. *Equity as affecting the Dissolution of Partnership.*

Grounds of
jurisdiction.

It is obvious that in no cases are the facilities afforded by Courts of equity for taking accounts more serviceable than in those respecting partnerships. Nor was their superiority to Courts of law in this respect the only element in establishing and confirming their jurisdiction in these matters. The Chancery procedure for procuring discovery, the powers of granting injunctions and of decreeing specific performance, added to the fitness of its Courts for dealing with disputes arising between partners, the nature of which is often such as to be beyond the reach of any adequate remedy under the procedure formerly known to the Courts of common law. It is not surprising, therefore, that, with the development of commercial pursuits, the High Court of Chancery acquired an almost exclusive jurisdiction in partnership cases; nor that, when that Court was replaced by the Chancery Division of the High Court of Justice, the dissolution of partnerships and the

taking of partnership accounts should prominently appear in the business especially assigned to that division (a).

By far the greater part of the considerations arising out of the contract of partnership are common to law and equity, and it would therefore be inappropriate to discuss them here. It suffices to call attention to matters to which the distinctive doctrines or remedies of equity are applicable. These may be classified as

The doctrines of equity affecting:—

- I. The nature and formation of the partnership :
- II. The partnership property :
- III. The relation of the partners *inter se* :
- IV. The relation of the partners to third persons, and particularly creditors :
- V. The dissolution of the partnership.

I. *The Nature and Formation of a Partnership.*

1. Partnership, according to English law, is the legal Definition.
tie subsisting between two or more persons who carry on together a business, in relation to the conduct of which they are mutually invested with the powers and liabilities of principal and agent. Mutual agency is the essence of partnership.

The term, however, in its widest sense has been defined as “the relation which subsists between persons who “have agreed to share the profits of a business carried on “by all or any of them on behalf of all of them” (b).

But this definition gives a more comprehensive meaning to the word than that which it bears at the present day ; for public companies, as well as partnerships in the ordinary sense, would be included in such a definition, while the distinction between public companies and private partnerships is so great that they cannot now be conveniently

Partnerships distinguished from companies.

(a) Jud. Act, 1873, s. 34.

(b) Pollock's Dig. p. 1.

treated together. It must be therefore observed that private partnerships for general business purposes may not consist of more than twenty persons; and for the business of banking of not more than ten persons. A partnership exceeding these numbers is only legal when it is either—

- (1.) Registered as a company under the Companies Act, 1862; or
- (2.) Formed in pursuance of some other Act of Parliament, or of letters patent; or is
- (3.) A company engaged in working mines within and subject to the jurisdiction of the Stannaries (*c*).

Partnerships coming under one or other of these distinctions we shall hereafter designate companies. The law respecting them is especially regulated by statute, and forms the subject of the following chapter.

Essential of
partnership.

2. Confining ourselves, then, to the consideration of partnerships in the restricted and more familiar sense of the word, some further elucidation is needed of the definition above quoted, since many important and subtle questions have arisen respecting the precise character or extent of the sharing of profits which is required to constitute the relation of legal partnership.

A leading authority on questions of this kind is the case of

COX v. HICKMAN.

[8 H. L. 268.]

In that case Benjamin and Josiah Smith carried on business under the name of Smith & Son. Becoming embarrassed, they executed a deed by which they assigned their property to trustees, and empowered them to carry on the business under the name of the Stanton Iron Company, and to divide the net income amongst the creditors in rateable proportions, with power for the majority of the creditors, assembled at a meeting, to make rules for con-

(*c*) 25 & 26 Vict. c. 89, s. 4.

ducting the business or to put an end to it altogether; and after the debts had been discharged the property was to be retransferred by the trustees to Smith & Son.

It was sought to make the creditors liable for debts incurred in the management of the business on the ground that their participation in the profits constituted them partners therein. But it was held that no partnership was created by the deed (*d*).

The principle that a mere sharing of the profits or receipt of a payment varying with the profits of a business is not of itself sufficient to constitute the relationship of partnership therein, which was strongly established in this case, was shortly afterwards further amplified and defined by an Act of Parliament commonly known as Bovill's Act (*e*).

It was thereby enacted that—

28 & 29 Vict.
c. 86.

“The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not of itself constitute the lender a partner with the person or persons carrying on such trade or undertaking or render him responsible as such” (*f*).

“No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking shall of itself render such servant or agent responsible as a partner therein nor give him the rights of a partner” (*g*).

“No person being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall by reason only of such receipt be deemed to be a

(*d*) See also *Mollwo March & Co.*
v. *Court of Wards*, 4 L. R. P. C.
419.

(*e*) 28 & 29 Vict. c. 86.
(*f*) s. 1.
(*g*) s. 2.

“ partner of or to be subject to any liabilities incurred by such trader ” (h).

“ No person receiving by way of annuity or otherwise a portion of the profits of any business in consideration of the sale by him of the goodwill of such business shall by reason only of such receipt be deemed to be a partner of or be subject to the liabilities of the person carrying on such business ” (i).

“ In the event of any such trader as aforesaid being adjudged a bankrupt or taking the benefit of any Act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than 20s. in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal or of the profits or interest payable in respect of such loan, nor shall any such vendor of a goodwill as aforesaid be entitled to recover any such profits as aforesaid until the claims of the other creditors of the said trader for valuable consideration in money or money’s worth have been satisfied ” (k).

*Pooley v.
Driver.*

This Act again has given rise to considerable discussion. In *Pooley v. Driver* (l), a person lent money to a firm under a contract that the loan should be repaid at the termination of the partnership, and that during the partnership and continuance of the loan the firm should account to the lender for the profits and pay him a definite share thereof. It was also provided that in the event of the lender’s bankruptcy the firm might pay off the loan and determine the agreement, that there should be a settlement of accounts at the end of the partnership, and payment of the loan and an agreed share of profits out of the assets, subject to the lender’s repayment of any sum overpaid to him on account of profits ; and the agreement

(h) s. 3.
(i) s. 4.

(k) s. 5.
(l) 5 Ch. D. 458.

expressly purported to be for an advance by way of loan under the provisions of the last-named statute. The firm having become bankrupt, it was held that the lender was liable for its debts, the transaction being merely a pretence of a loan, and in fact amounting to a partnership. A similar transaction was similarly regarded in *Exp. Delhasse (m)*.

On the contrary, where a father became security for his son for £10,000 on the latter's becoming a member of Lloyd's, and the son covenanted with the father that S. and no other person should underwrite at Lloyd's in the name of the son; that S. should be paid £200 a year and one-fifth of the profits of underwriting; that the father should be at liberty to withdraw the whole of his security on notice being given to the son and other necessary parties, and that immediately after such notice S. should cease to underwrite for the son or in his name; and that one half the net profits of underwriting, deducting the share of S., should, together with a sum of £25 per annum, be considered as owing and paid to the father by the son: it was held that there was no partnership between the father and the son, but merely the relation of debtor and creditor (*n*). A similar decision was arrived at where there was an agreement between a clerk and his employers, that, in addition to a fixed salary, he should, on paying £1,500 into the business, receive one-eighth of the profits, and bear one-eighth of the losses, the agreement being determinable by four months' notice (*o*).

The result of the cases and true test of a partnership amounts to this, that the real intention of the parties must be ascertained by a consideration of the facts of each particular case, and that that intention determines the nature of the relationship between them. On the one hand, a sharing of profits does not alone constitute a partnership.

Intention
of parties
is true test.

(*m*) 7 Ch. D. 511.

(*n*) *Exp. Tennant*, 6 Ch. D. 303.

(*o*) *Walker v. Hirsch*, 27 Ch. D. 460, dissenting from *Pawsey v.*

Armstrong, 18 *ib.* 698; and compare *Frowde v. Williams*, 56 L. J. Q. B. 62.

On the other hand, if it appears that a partnership in effect was contemplated by the parties, its natural consequences cannot be evaded by procuring an advance of capital under the outward and pretended form of a loan (*p*).

Specific performance, when decreed.

3. As regards the formation of a partnership, it is elsewhere remarked that Courts of equity will not usually interfere to decree specific performance of an agreement to that effect (*q*). Only when the agreement specifies a definite term, and has been partly performed, can this relief be successfully sought (*r*).

II. *Equity as affecting the Partnership Property.*

Ownership by partners.

1. "The partners in any firm are owners in common of all property and valuable interests originally brought into the partnership stock, or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business" (*s*).

Share of a partner.

"The share of a partner is his proportion of the partnership assets after they have been all realised and converted into money, and all the debts and liabilities have been paid and discharged" (*t*).

Doctrines as to real estate.

Where the property of the partnership comprises real estate, especial attention is required to the doctrines of equity as affecting it and its devolution.

Land may become partnership property either by being brought in at the formation of the firm by one or more of the partners, or by being purchased out of the partnership funds, or by being devised to the firm. It was formerly very material to inquire in which of these ways the land in question came to be a partnership asset; but more recent cases have to a great extent broken down the distinctions between them.

(*p*) See also *Syers v. S.*, 1 App. C. 174.

(*q*) p. 654.

(*r*) *England v. Curling*, 8 Beav. 129; *Herey v. Birch*, 9 Ves. 357.

(*s*) Pollock's Dig. Ptship. p. 53.

(*t*) Lindley, 339, ed. 5.

In the first place, it must be understood that *modus et conventio vincunt legem*. It is quite open to the partners by the articles of partnership, or any other agreement between them, to determine, as between themselves, the mode of disposition of the partnership property. Our inquiry only relates to cases in which this has not been done.

(1.) If land belongs to the partners separately before the commencement of the partnership, or, if even it belongs to them as tenants in common, *a fortiori*, if it belongs to one of them alone, then the fact that it is used for partnership purposes will not make it partnership property (*u*).

Lands brought in at formation of firm.

(2.) If lands are purchased with partnership funds, it was in some early cases held that, in the absence of express agreement, the partners occupied as joint tenants, with a right of survivorship (*x*). But it has since been maintained by many high authorities that lands so acquired are to be regarded as accessory to the business of the partnership, and that the right of survivorship has no application thereto (*y*). And though the conveyance of real estate in these circumstances be taken in the name of one of the partners, yet, if purchased with partnership money, there will be a resulting trust in favour of the firm (*z*).

Lands purchased with partnership funds.

The question on which such cases depend resolves itself into a question as to the purposes for which the property was bought. If for the purpose of carrying on the partnership business, or for the purpose of a speculation on account of the partnership, there will be an equitable tenancy in common and no survivorship: if for the separate use of the partners, not in connexion with the

(*u*) *Burdon v. Barkus*, 4 De G. F. & J. 42; 8 Jur. N. S. 656; *Crawshay v. Maule*, 1 Swanst. 495, 523; *Roberts v. Eberhardt*, Kay, 159.

(*x*) *Jeffereys v. Small*, 1 Vern. 217.

(*y*) *Elliott v. Brown*, 3 Swanst. 489; *Lyster v. Dolland*, 1 Ves. jr. 421.

(*z*) *Smith v. S.*, 5 Ves. 193; *Clegg v. Fishwick*, 1 Mac. & G. 294.

business, there will be a simple joint tenancy and survivorship, with which equity will not interfere (*a*).

Lands
devised.

(3.) Where lands have been devised to partners, the decisions as to whether or not it is to be regarded as partnership property have been very conflicting. A distinction was drawn between devised lands and purchased lands which were similarly used by a firm, in the case of *Morris v. Barrett* (*b*), the latter being deemed partnership property, the former not so; and a similar rule as to devised property was followed in *Brown v. Oakshot* (*c*) and *Phillips v. P.* (*d*). On the contrary, lands devised were deemed accessory to the trade and as partnership property in *Jackson v. J.* (*e*) and *Crawshay v. Maule* (*f*); and, by the more recent and strong case of *Waterer v. W.* (*g*), such lands seem to have been placed on the same footing as lands purchased; the question depending on whether they are "substantially involved in the business."

Conversion of
real estate in
cases of
partnership,
when it takes
place.

(4.) Where partners hold real estate for partnership purposes, the question arises, whether the real estate is not, even in the absence of any expressed intention of the partners, so absolutely converted into personalty as to be held by the surviving partners not in trust for the heir-at-law, but for the personal representative of the deceased partner. It is clearly settled that where real estate is purchased with partnership capital, for the purposes of partnership trade, it will, in the absence of any express agreement, be considered as absolutely converted into personalty, so as to pass to the personal representatives of a deceased partner, free from dower (*h*). On the contrary, where real estate belonged to the partners at the time of their entering into partnership, or has been subsequently acquired by them

(*a*) *Bank of England case*, 3 De G. F. & J. 645.

(*b*) 3 Y. & J. 384.

(*c*) 24 Beav. 254.

(*d*) Lindley, 332, ed. 5.

(*e*) 9 Ves. 591.

(*f*) 1 Swanst. 495.

(*g*) 15 Eq. 402.

(*h*) *Townsend v. Devaynes*, 1 Mont. on Partnership, App. 97; *Fereday v. Wightwick*, 1 Russ. & M. 45.

out of their own private moneys, or by gift, it was formerly held that conversion would not, unless by express agreement, take place, although the real estate had been used for partnership purposes in trade (*i*).

More recent cases, however, have proceeded upon the broader principle, that where real property has been substantially involved in a business or trade, it is part of the partnership property, and therefore personal estate, and that it is immaterial how it may have been acquired by the partners, whether by descent or devise (*k*).

Modern rule
in favour of
conversion.

The question then comes to this, that, as a general rule, it is inherent in the contract of partnership and needs no special stipulation, that upon the dissolution of the partnership all the property thereof must be sold and the proceeds, after payment of all the partnership liabilities, divided among the partners according to their shares, no one partner having any right to insist on retaining his share of any one item of the property *in specie*. It follows that any real property which has become the property of the partnership becomes, by force of the partnership contract, converted into personalty; and that not merely between the partners, but as between their representatives after their decease (*l*), and also for fiscal purposes, so that the Crown can claim legacy and probate duty in respect thereof (*m*). Partnership land is, however, still within the restrictions of the Mortmain Act (*n*).

Both principle and authority also point to the conclusion that conversion will take place not only where real property is acquired for the purposes of partnership in trade, but also where it is acquired with the partnership

Land pur-
chased for re-
sale con-
verted.

(*i*) *Thornton v. Dixon*, 3 Bro. C. C. 199; *Phillips v. P.*, 1 My. & K. 649; *Balmain v. Shore*, 9 Ves. 500; *Cookson v. C.*, 8 Sim. 529.

(*k*) *Waterer v. W.*, *sup.*

(*l*) *Darby v. D.*, 3 Drew. 495,

503, 506.

(*m*) *Forbes v. Steven*, 10 Eq. 178, 189; *Att.-Gen. v. Hubback*, 10 Q. B. D. 488; 13 *ib.* 275.

(*n*) *Ashworth v. Munn*, 15 Ch. D. 363.

funds for the purpose of a re-sale upon a speculation not coming within the usual denomination of trade (*o*).

Conversion by agreement.

Of course, if the owners of real estate upon entering into partnership direct or agree that it shall be sold upon the death of one of them, it will be held to be absolutely converted into personalty, and will go to the personal representative, the conversion being held to have taken place at the date of the agreement (*p*).

Dealings inconsistent with conversion.

But real estate may be so dealt with by partners as to prevent this result, by showing that conversion was not intended; as, for instance, if they procure it to be conveyed to them in equal undivided shares (*q*); and the result is the same, where, though purchased out of partnership capital, it is not used for the purposes of the partnership in trade (*r*). Also where real estate was purchased for the purpose of the partnership in trade, but by agreement between the partners it was to be the separate property of one of them, who took a conveyance thereof in his own name, it was held that it was not partnership property, and was liable to dower (*s*).

Reconversion.

So, likewise, property purchased with partnership capital, for partnership purposes in trade, and therefore converted into personalty, may be reconverted by the express or implied agreement of the partners. As an instance of what amounts to an implied agreement, may be mentioned a stipulation for payment of rent by the partnership to one or some of the individual partners (*t*).

(*o*) *Darby v. D.*, 3 Drew. 495.

(*p*) *Essex v. E.*, 20 Beav. 442.

(*q*) *Custance v. Bradshaw*, 4 Ha. 315.

(*r*) *Bell v. Phyn*, 7 Ves. 453;

Randall v. R., 7 Sim. 271.

(*s*) *Smith v. S.*, 5 Ves. 193.

(*t*) *Rowley v. Adams*, 7 Beav. 548.

III. *Equity as affecting the Rights of Partners inter se.*

1. The jurisdiction of equity respecting the mutual Actions be-
tween parties rights of partners was especially required to meet the ends of justice because of the great restrictions imposed by the principles of the common law on actions between partners. A firm or partnership had formerly no judicial existence at at law, law as distinguished from the persons composing it. If then one partner had a claim against the partnership, for instance, for money advanced on its account, or on the other hand, if one partner was indebted to the partnership, it would have been formerly necessary that in the first case all the partners (including the plaintiff) should appear as defendants; and in the second, that all the partners (including the defendant) should appear as plaintiffs. But by the technical rules of law, the same person could not appear as both plaintiff and defendant in an action. There was, therefore, a purely formal, but none the less insuperable hindrance to the legal remedy in such cases (*u*). Equity, however, in equity. disregarding these distinctions of form, entertained such cases and decreed as justice required, demanding only that all the parties, whether as plaintiffs or defendants, should be before the Court (*x*). Hence its jurisdiction over an extensive class of cases involving mere money demands. It need scarcely be repeated that at present the rules of equity in this as in other respects prevail in all divisions of the High Court.

2. Many other cases, however, come within the cognizance of equity on the ground of the particular forms of relief which it is able to give. Some of these fall more appropriately under the head of dissolution, and are accordingly postponed for the present. Others might with perfect consistency be relegated to the general headings of injunction and specific performance; but the balance of

(*u*) *Bovill v. Hammond*, 6 B. & C. N. 319.
151; *Sedgwick v. Daniell*, 2 H. &

(*x*) *Wright v. Hunter*, 5 Ves. 792.

convenience nevertheless seems in favour of their consideration here.

Specific performance of articles

Where there are articles of partnership the assistance of equity is often sought for the purpose of compelling the specific performance thereof. The general principles on which this peculiar form of relief is granted are elsewhere fully considered. It suffices here to say that questions arising on partnership articles fall entirely within those principles, the most conspicuous of which is that no such relief is given if there is an adequate remedy at law.

illustrated.

The application of remedy in cases of partnership articles may best be illustrated by referring to cases in which specific performance has been decreed of agreements respecting the style or name of the partnership (*y*); of agreements not to carry on business within a certain area or limits of time (*z*); of agreements as to the custody and inspection of the partnership books (*a*); of agreements as to the mode of valuing the share of an outgoing or a deceased partner (*b*); of agreements giving a right of pre-emption of the share of an outgoing partner (*c*); of agreements to grant an annuity to a retiring partner (*d*); and of agreements not to divulge a trade secret (*e*). As to specific performance of agreements to refer to arbitration, see p. 654.

It is observable that in many of these cases, the agreements being negative, the remedy of specific performance takes the form of an injunction.

Injunctions.

3. In the absence of articles of partnership, the mutual rights of the partners are determined by the general principles of law, and are equally enforceable in equity by means of the remedy of injunction. Thus acts tending

(*y*) *Marshall v. Colman*, 2 J. & W. 266, 289.

(*z*) *Wittaker v. Howe*, 3 Beav. 383; *Turner v. Major*, 3 Giff. 442.

(*a*) *Lingen v. Simpson*, 1 S. & S. 600.

(*b*) *Morris v. Kearsley*, 2 Y. & C. Ex. 139; *Gibson v. Goldsmid*, 5 De G. M. & G. 757.

(*c*) *Homfray v. Fothergill*, 1 Eq. 567.

(*d*) *Aubin v. Holt*, 2 K. & J. 66.

(*e*) *Morison v. Moat*, 9 Ha. 241.

to the destruction of the partnership property have been so restrained (*f*); and the same remedy has been applied where a partner has been hindered in the exercise of his legal right to partake in the management of the business (*g*). And, generally, acts inconsistent with the proper duties of partners may be restrained by injunction, even though no dissolution is sought, no countenance being given to any one of the partners who seeks by improper conduct to drive others to a dissolution (*h*). Questions involving the application of injunctions for the protection of the goodwill of a business are considered at p. 742.

Similarly, and for similar reasons, an account may be decreed in equity without seeking a dissolution; not, however, a continuous account of the business operations. The Court will not so undertake the carrying on of a business, though it will in proper cases investigate its accounts up to the time of commencing the action (*i*). Account.

4. A third particular in which equity exercises beneficial influence in preserving the rights of partners is by its application of the principle of constructive trusts to cases in which a partner unconscientiously seeks to take advantage of his position to the prejudice of his co-partners. Constructive trusts where unfair advantage made.

Cases in illustration of this have already been given and commented on (*k*); and at present, therefore, mere reference will suffice to such cases as the renewal of leases and purchases of partnership property by individual partners.

(*f*) *Miles v. Thomas*, 9 Sim. 606;
Marshall v. Watson, 25 Beav. 501.

(*g*) *Anon.*, 2 K. & J. 441.

(*h*) *Hall v. H.*, 12 Beav. 414;
 20 *ib.* 139; 3 Mac. & G. 79; *Fair-*

thorne v. Weston, 3 Ha. 387.

(*i*) *Loscombe v. Russell*, 4 Sim. 8;

Fairthorne v. Weston, *sup.*

(*k*) *Supra*, pp. 89 and 102.

IV. *Equity as affecting the relation of Partners to Third Persons.*

Actions
between firms
having a
common
partner.

1. Recourse to equity was sometimes needed as between one partnership and another, on the same grounds as those above shown to have founded its jurisdiction in matters of account between the members of a single partnership. Thus, for the reason already given, it was formerly impossible for one firm to sue another at law if there was one partner common to both firms (*l*). But equity in this case, as in the other, was independent of such technical difficulties, and, having the parties before it, adjudicated upon the dealings between the firms, determining and enforcing their respective rights (*m*).

2. But the jurisdiction of equity as between partnerships and third persons is most conspicuous in its administration of the assets of partnerships and partners for the benefit of creditors.

Joint liability
of partners.

(1.) Every partner is liable jointly with the other partners for all debts and obligations incurred while he is partner, and in the usual course of the partnership business by or on behalf of the firm (*n*).

*Kendall v.
Hamilton.*

It has been recently decided by the highest authority that as between living partners and creditors the liability for the debts of the partnership is joint only, and not several (*o*). Thus, where a creditor obtains a judgment against two partners, he cannot afterwards sue for the same debt a third person whom he subsequently discovers to have been a partner with the first defendants. And where a firm of two partners dissolved, one retiring and the other carrying on the business with a new partner, a customer of the old firm who delivered goods to the new

Several lia-
bility of estate
of deceased
partner.

(*l*) *Bosanquet v. Wray*, 6 Taunt. 597.

(*m*) *Mainwaring v. Newman*, 2 B. & P. 120.

(*n*) Pollock Dig. Ptship. 25. See

Cleather v. Twisden, 28 Ch. D. 340; 24 *ib.* 731.

(*o*) *Kendall v. Hamilton*, 4 App. C. 504; *Cambefort v. Chapman*, 19 Q. B. D. 229.

without notice of the change, could not sue the old partner after proving in bankruptcy against the new firm (*p*). But the case of the death of a partner presents an exception to the ordinary rule as to joint debts. Though at law only the survivor of the joint debtors could be sued, in equity recourse might always be had to the estate of the deceased partner, and the principle of *Kendall v. Hamilton* does not apply (*q*).

(2.) In the distribution, however, of the estates of deceased partners in Chancery, and of bankrupt and insolvent partners in bankruptcy, the partnership property is applied as joint estate in payment of the debts of the firm; and the separate property of each partner is applied in payment of his separate debts. If in either case there is a surplus, then the surplus of the joint estate is applicable for the payment of the separate debts, and the surplus of the separate estate for the payment of the partnership debts.

Administra-
tion of assets.

Thus, if A. and B. are in partnership, and on A.'s death his estate is administered by the Court, both A.'s and B.'s estates being solvent, A.'s separate creditors and the creditors of the firm may prove their debts against A.'s estate, and be paid out of his assets *pari passu*. The payments thus made to creditors of the firm must then be allowed by B. in account with A.'s estate as payments made on behalf of the firm, so that in ascertaining the value of A.'s share in the partnership these payments are credited to him. If, however, A.'s estate is insolvent, and the creditors of the firm proceed to recover the full amount of their debts from the solvent partner B., B. will then become a creditor of A.'s separate estate for the amount of the partnership debts paid by B. beyond his proportion as determined by the partnership contract. If B. is also insolvent, the creditors of the firm must first resort to the

Illustrated.

(*p*) *Scarfe v. Jardine*, 7 App. C. 345.

(*q*) *Beckett v. Ramsdale*, 31 Ch. D. 177; *Baring v. Noble*, 2 R. & M. 475.

partnership property, and the separate creditors of the partners to the separate estates of each respectively. The partnership creditors can only resort to so much of the separate property of the partners as remains after paying the separate debts in full, and the separate creditors can only resort to so much of the partnership property as remains after paying the debts of the firm in full (*r*). It follows from this rule of administration, that a partnership creditor who is indebted to a deceased or insolvent partner cannot set off his separate debt against the partnership debt due to him (*s*). And if in an action against the separate estate for a joint debt, it is shown that the separate estate is insufficient to meet the separate debts, the action is futile and will be dismissed (*t*).

Exceptional cases.

Debts arising through fraud.

Such is the general principle of the distribution of the joint and separate assets. It is, however, subject to certain exceptions. Thus, if a partnership debt is contracted by the fraud of any of the partners, the creditor so defrauded may, at his option, treat it as a joint or separate debt (*u*). If there is no joint estate of a bankrupt firm, the partnership creditors may at once resort to the separate estates; but joint estate of the most trifling amount will exclude this right (*x*).

3. On the other hand, the trustee in bankruptcy of a bankrupt firm may prove against the separate estate of any partner, where that partner has fraudulently converted partnership property to his own use without the consent or ratification of the other partners (*y*).

Partner may not prove in competition with creditors.

It is to be observed further, that in the administration of the joint estate of a firm, or of the separate estate of any

(*r*) See Pollock's Dig. Ptship. 110, 111; *Ridgway v. Clare*, 19 Beav. 111; *Lodge v. Pritchard*, 1 De G. J. & S. 610; *Exp. Dear*, 1 Ch. D. 519.

(*s*) *Stephenson v. Chiswell*, 3 Ves. 566.

(*t*) *Edwards v. Barnard*, 32 Ch.

D. 447.

(*u*) *Exp. Adamson*, 8 Ch. D. 807; *Re Davison*, 13 Q. B. D. 50.

(*x*) *Exp. Kennedy*, 2 De G. M. & G. 228; *Exp. Clay*, ib. 230, n.

(*y*) *Exp. Harris*, 2 V. & B. 210; *Lacey v. Hill*, 4 Ch. D. 537; *Read v. Bailey*, 3 App. C. 94.

partner, no partner or lender of money under 28 & 29 Vict. c. 86, can prove for a debt due to him from the partnership in competition with the outside creditors of the firm, or with those of any other partner. His claim only arises when all the external debts of the firm have been paid, except in case his property has been fraudulently converted to the use of the firm (z). But this rule does not interfere with any security taken by the lender or partner (a).

V. *The Dissolution of Partnerships.*

1. The first consideration is by what means a dissolution of a partnership may be effected.

Generally the duration of a partnership is fixed on by the agreement of the partners. When so fixed, the agreement will not be interfered with by a Court of equity, except under special circumstances, which will be presently considered. The partnership, however, may at any time be dissolved by the common consent of all the partners (b). And it is quite open to the partners by their agreement to provide that the partnership shall be dissolved at the option of any one or more of them, without the consent of all. In such a case the Court may compel a partner to sign a notice of dissolution (c). In the absence of agreement, or of the special interference of the Court, a partnership for a fixed term only expires with the efflux of the time agreed upon for its duration (d). If after the expiration of the agreed term the firm continue to trade as partners without making any new agreement, the original contract is deemed to be prolonged by tacit consent, and all its conditions remain in force except in so far as they

Where term is fixed.

(z) *Exp. Andrews*, 25 Ch. D. 505; (c) *Hendry v. Turner*, 32 Ch. D. 355.
Exp. Hayman, 8 Ch. D. 11.
 (a) *Exp. Sheil*, 4 Ch. D. 789; (d) *Featherstonehaugh v. Fenwick*, 17 Ves. 298.
Badeley v. Consol. Bank, 34 ib. 536.
Hall v. H., 12 Beav. 414.

are inconsistent with any implied term of the renewed contract. It is an implied term of the new contract that each partner has the right to instantly determine the partnership (*e*). But this right must be exercised *bonâ fide* and not for the sake of obtaining an undue advantage (*e*).

Dissolution
by operation
of law.

In the following cases, notwithstanding that a definite term has been expressly agreed upon, the partnership is determined by operation of law.

Death of
partner.

(1.) The death of any partner dissolves the partnership, and this (in the absence of any previous agreement to the contrary) not only as to himself, but as between all the members of the firm (*f*).

Alienation of
share by law.

(2.) The alienation of the share of any partner by operation of law dissolves the partnership. Thus if a partner becomes bankrupt (*g*), or outlawed (*h*), or his property is taken in execution (*i*), the partnership is dissolved.

Assignment
of share.

(3.) Unless the shares in the partnership are by agreement assignable, a partnership at will is dissolved by an assignment or incumbrance of his share by a partner (*k*). In the case of a partnership for a fixed term, it seems that such an assignment or incumbrance is at least a valid ground for seeking dissolution (*l*).

Business
becoming un-
lawful.

(4.) A partnership is dissolved by the happening of any event which makes it unlawful to carry on the business thereof. For instance, a declaration of war between England and a foreign country dissolves a partnership between an Englishman and a subject of that country (*m*).

Dissolution by
decree.

Grounds of.

(5.) A partnership may also be dissolved by decree of a Court of equity. Such a decree may be obtained under any of the following circumstances:—

Incapacity.

i. When any partner becomes permanently incapable of performing his part of the partnership contract.

(*e*) *Neilson v. Mossend Iron Co.*,
11 App. C. 298.

(*f*) *Gillespie v. Hamilton*, 3 Mad.
251; *Backhouse v. Charlton*, 8 Ch.
D. 444.

(*g*) *Barker v. Goodair*, 11 Ves. 83.

(*h*) *Pollock Dig.* 72.

(*i*) *Lindley*, 583, ed. 5.

(*k*) *Lindley*, 584, ed. 5.

(*l*) *Lindley*, 584, ed. 5; *Nerot v.*
Burnard, 4 Russ. 247.

(*m*) *Esposito v. Bowden*, 7 E. & B.
763.

In case of a partner being found lunatic by inquisition, Lunacy. the jurisdiction to dissolve the partnership is in the Lord Chancellor or Lords Justices (*n*). If otherwise shown to be of permanently unsound mind, the Chancery Division will so decree (*o*). Lunacy, however, does not *ipso motu* effect a dissolution. Physical incapacity is, equally with mental derangement, a ground for seeking dissolution (*p*).

ii. When a partner so conducts himself with reference Bad conduct. to partnership matters that it becomes practically impossible for the other partners to carry on the business with him.

Conduct coming under this description may consist of active improprieties or of negligence. Breaches of trust or confidence (*q*), habitual or persistent breaches of the articles of the partnership, for instance, as to the mode of carrying on the business (*r*), and the becoming liable to a criminal prosecution (*s*), afford good grounds for seeking a decree of dissolution (*t*). So also does persistent negligence of the partnership business by a partner whose duty it is to devote his attention to it (*u*).

The Court will not, however, regard mere disagreements or quarrels, or incompatibility of temper between partners (*x*), unless they be of such an aggravated nature as to destroy all confidence and the possibility of advantageous working (*y*).

iii. When the business of the partnership can only be Business loss. carried on at a loss, or there is no reasonable prospect of profit (*z*).

iv. It has already been noted that the assignment or in- Assignment of share.

- (*n*) 16 & 17 Vict. c. 70.
 (*o*) *Waters v. Taylor*, 2 V. & B. 373.
 299, 303; *Jones v. Hoy*, 2 My. & K. 482.
 125; *Jones v. Lloyd*, 18 Eq. 265.
 (*p*) *Whitwell v. Arthur*, 35 Beav. 140.
 (*q*) *Smith v. Jeyes*, 4 Beav. 503.
 (*r*) *Waters v. Taylor*, *sup*.
 (*s*) *Essel v. Hayward*, 30 Beav. 158.
 (*t*) See *Atwood v. Maude*, 3 Ch. 373.
 (*u*) *Harrison v. Tennant*, 21 Beav. 482.
 (*x*) *Wray v. Hutchinson*, 2 My. & K. 235; *Goodman v. Whitcomb*, 1 J. & W. 589.
 (*y*) *Baxter v. West*, 1 Dr. & S. 173; *Leary v. Shout*, 33 Beav. 582.
 (*z*) *Jennings v. Baddeley*, 3 K. & J. 78.

cumbrance of his share by a partner for a fixed term affords, in the absence of agreement to the contrary, a ground for seeking dissolution.

Partnership induced by fraud.

v. In this place it is also appropriate to observe that if a partnership has been induced by any species of fraud or imposition, the contract may be dissolved *ab initio* at the suit of the party deceived (a).

Unless there is a distinct breach of the partnership articles, a dissolution, if decreed, will not be made retrospective, but will operate only from the date of the judgment (b).

Return of premium.

2. On dissolution being decreed of a partnership entered into for a definite term, and in consideration of the payment of a premium, the Court will generally direct the return of a proportionate part of the premium (c); but it will not so direct if the dissolution is rendered necessary by the misconduct of the party paying the premium (d). It is only under special circumstances that a return of premium will be decreed unless a case for it is made out at the trial (e).

Rights of creditors in dissolution.

3. On the dissolution of a partnership the existing creditors of the firm of course retain all their rights against the partners which have already accrued.

Further than this, if the firm continues its business, and no notice of the retirement of a partner is given to a creditor, and the retiring partner was known by him to have been a partner in the firm, such retiring partner remains liable as if he had continued in the firm (f). But if the retiring partner was unknown to the creditor as a partner, his liability entirely ceases on his retirement. As regards past customers of a firm, it appears that mere

(a) *Rawlins v. Wickham*, 1 Giff. 355; *Hue v. Richards*, 2 Beav. 305; *Maycock v. Beaton*, 13 Ch. D. 384.

(b) *Lyon v. Tweddle*, 17 Ch. D. 529.

(c) *Atwood v. Maude*, 3 Ch. 369; *Wilson v. Johnstone*, 16 Eq. 606.

(d) *Bluck v. Capstick*, 12 Ch. D. 863.

(e) *Edmonds v. Robinson*, 29 Ch. D. 170.

(f) *Exp. Robinson*, 3 D. & Ch. 388.

public advertisement of dissolution in the *London Gazette* is not sufficient notice to prevent the continuance of their rights; but such advertisement is sufficient notice of the fact to creditors who were not customers at the time of dissolution (*g*).

The estate of a partner who dies (*h*) or who becomes bankrupt (*i*) is not in any case liable to any future debts of the firm; and it is immaterial that the person giving credit thereafter is ignorant of the fact of such death or bankruptcy (*k*).

Where a dissolution has taken place, an account will not only be decreed, but, if necessary, a manager or receiver will be appointed to close the partnership business and sell the partnership property, so that a final distribution may be made of the partnership effects (*l*). But a manager or receiver will not be appointed except with a view to a dissolution (*m*).

(*g*) Lindley, 222, ed. 5.

(*h*) *Brice's Case*, 1 Mer. 622.

(*i*) Lindley, 752, ed. 5.

(*k*) *Houlton's Case*, 1 Mer. 616.

(*l*) Story, 672.

(*m*) *Hall v. H.*, 3 Mac. & G. 79.

CHAPTER IV.

THE LAW OF COMPANIES.

- I. *Corporate Associations, their Development and Constitution.*
 - II. *Important Principles of Law affecting Companies.*
-

ON account of the practical importance of the subject to students intending to practise at the Chancery Bar, and to the equity draftsman and conveyancer, it has been thought advisable to introduce what is a new feature in a text-book of equity, in the form of a Chapter upon the Modern Law of Joint Stock Companies, the principles of which law are, to a great extent, distinctively equitable principles, and the administration of which has been specially assigned to the Chancery Division (*a*).

In order to present the subject in the most intelligible form, it has been thought convenient: *first*, to give a brief outline of the development and constitution of companies and corporate associations generally; and, *secondly*, to introduce the student to the more detailed principles of law applicable to the modern joint stock companies.

(*a*) That is, to what was the High Court of Chancery, by the Companies Act, 1862, s. 82.

I. *Corporate Associations, their Development and Constitution.*

Corporations are artificial or constructive legal personages, the use and chief characteristic of which is that they have, as Blackstone says, "a kind of legal immortality," preserving their identity through a perpetual succession of natural persons (*b*), and, though composed from time to time of different individuals, continuing as a corporation to be called by the same name.

Corporations defined.

They are either (1) corporations sole, consisting only of one person, such as a bishop, a parson, or the Chamberlain of London; or (2) corporations aggregate, composed of several persons, and performing all important legal acts by means of their common seal (*c*).

Corporations :
(1) Sole ;
(2) Aggregate.

Corporations of the latter class, of which we have now to speak, were originally created either by charter granted by royal letters patent or by Act of Parliament; and until the present reign all joint stock companies which had not obtained this expensive sanction were, in fact, merely private partnerships on an extended scale.

Corporations aggregate.
Companies incorporated by act or charter.

"Public" associations, the objects of which involved an interference with public or private vested interests, such, for instance, as the compulsory purchase of land for the purposes of making railways, always required, it is hardly necessary to say, the authorization of the Crown or of the Legislature, and still require the latter. But their constitution was usually a complex and elaborate matter, until, in the year 1845, an Act (since amended) was passed, providing both for the incorporation of all public joint stock companies (*d*), and also for a uniformity in the mechanism and constitution of companies so incorporated. With this object, the clauses and provisions which it was

The Clauses Consolidation Acts.

(*b*) See Williams' Personal Property.

(*c*) See Bacon's Abridgment, tit. Corporations.

(*d*) Stats. 7 & 8 Vict. cc. 110 and 113, both now repealed by the Companies Act, 1862.

usually found necessary to insert in the various Acts of Parliament by which companies were constituted for the carrying out of various public undertakings, such as the making of railways, harbours, and docks, the supplying of water, the cleansing and lighting of towns, &c., have been "consolidated," as it is called, in general Acts dealing with each of these various matters; and it is provided that the clauses and provisions of these general Acts, save so far as they shall be expressly varied or excluded by any special Acts, shall apply to every undertaking which shall thereafter be authorised by Parliament for any of the purposes above referred to (*e*). By this means the length of the Acts of Parliament required to constitute a company for any of the above-mentioned objects was greatly diminished.

Again, in the case of joint stock companies which had not been incorporated by either of the aforesaid methods, and which therefore, as we have said, remained mere partnerships, considerable inconvenience was experienced wherever it became necessary for the company to sue a shareholder, owing to the technical difficulty of a plaintiff *suing himself* (*f*). In order to remove this disability various enactments were passed, the most important being the Joint Stock Companies Registration Act, 1845 (*g*). The regulation of joint stock banks was provided for by a special Act of the same year (*h*). The bankruptcy of joint stock companies was provided for by the Joint Stock Companies Winding-up Act of 1848 (*i*); and the principle of "limited liability" was introduced by an Act of 1855 (*k*). *All the above statutes*, the dates of which sufficiently indicate the recent development of this branch of the law,

(*e*) The Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), amended by the Companies Clauses Acts, 1863 and 1869 (26 & 27 Vict. c. 118; 32 & 33 Vict. c. 48). The other statutes dealing with various public undertakings have similar titles. The Tramways Act, 1870, was passed to facilitate

the construction and regulate the working of tramways (33 & 34 Vict. c. 78).

(*f*) See the Chapter upon Partnership, p. 577, *sup*.

(*g*) 7 & 8 Vict. c. 110.

(*h*) *Ibid.* c. 113.

(*i*) 11 & 12 Vict. c. 45.

(*k*) 18 & 19 Vict. c. 133.

have now been either repealed by or consolidated in the Companies Act of 1862 (*l*), as amended by the Companies Acts of 1867 and 1877 (*m*), which now regulate the whole law upon the subject.

Under these Acts seven or more persons associated for any lawful purpose may, by subscribing their names to a "memorandum of association," and otherwise complying with the requisitions of the Acts in respect of registration, form themselves into an incorporated company with or without limited liability (*n*). No banking partnership composed of more than ten persons may carry on business, unless it be either registered under these Acts or authorised by some other Act of Parliament or letters patent; and the same provision applies to all partnerships of more than twenty persons having for their object the acquisition of gain (*o*), except companies engaged in working mines under the jurisdiction of the Stannaries (*p*).

The liability of the shareholders of a company formed under the Act of 1862, may, according to the memorandum of association, be limited either to the amount unpaid upon the shares respectively held by them, or to the amount which they agree severally to contribute in the event of the company being wound up, that is to say, either by shares or, as it is called, by guarantee (*q*); and under the Companies Act of 1867, the liability of the directors or managers of a limited company may, if so provided by the memorandum of association or fixed by special resolution, be unlimited.

In respect of their liability, limited or unlimited, as members of the company, the shareholders are spoken of as contributories.

By a statute passed in 1879 in consequence of the collapse of the Glasgow Bank in the preceding year, a

Companies
Acts, 1862
and 1867.

Limited
liability.

Liability of
directors.

Companies
Act, 1879.

(*l*) 25 & 26 Vict. c. 89.

(*m*) 30 & 31 Vict. c. 131, and
40 & 41 Vict. c. 26.

(*n*) C. A. 1862, s. 6.

(*o*) *Ibid.* See *Shaw v. Benson*,

11 Q. B. D. 563.

(*p*) C. A. 1862, s. 4.

(*q*) *Ibid.* ss. 7, 9.

company already registered with unlimited, may register again with limited liability.

The memorandum of association.

The memorandum of association is the document which constitutes the company. It must state the name of the company, the objects for which it is formed, the amount of its capital, and the locality in which its registered office is to be situated (*r*). The memorandum must be stamped as if it were a deed, and must be signed by each of the seven or more subscribers and witnessed. It must next be registered at the office of the registrar-general of joint stock companies, and when registered it is binding upon the company as a corporation, and upon each and all of the several members (*s*). As a general rule no alteration can be made of the conditions contained in the memorandum of association. But any company limited by shares is empowered to increase its capital, to convert into stock (*t*), or, by special resolution, with leave of the Court, to subdivide (*u*) its existing shares as fixed by the memorandum of association.

Effect of registration.

Articles of association.

"*Ultra vires*."

The memorandum may in the case of a company limited by shares, and must in the case of a company unlimited or limited by guarantee, be accompanied by *articles of association* prescribing the regulations agreed upon for the management of the company, any infringement of which, and still more any breach of the provisions of the memorandum of association, is said to be an act "*ultra vires*" of the directors, or of the company, as the case may be. Appended to the Companies Act is a set of such articles (*x*), which may be adopted "*en bloc*," and which frequently form the basis of the articles of companies incorporated under the Act. The regulations and provisions contained in this table apply, in so far as they are not modified or excluded by the articles (*y*), to all companies limited by

(*r*) C. A. 1862, ss. 39, 41, 43, 44.

(*s*) *Ibid.* s. 11.

(*t*) *Ibid.* s. 12.

(*u*) C. A. 1867, ss. 9—20, and

C. A. 1877.

(*x*) C. A. 1862, Sched. I. Table

A.

(*y*) C. A. 1862, s. 50.

shares (z). The articles must be stamped, signed, and attested in the same manner as the memorandum (a), and be registered with it (b); upon which the company, with all its rights and capacities, is legally complete.

It is to be observed, however, that companies formed for objects not involving the acquisition of gain, either by the company collectively, or by individual members, remain under the peculiar disability of not being able, without the sanction of the *Board of Trade*, to hold more than two acres of land.

The regulations contained in the articles of association, or in "Table A," may, subject to the provisions of the Act, and to the conditions contained in the memorandum of association, be altered or modified by special resolution (c), i.e., by a resolution passed by a majority of not less than three-fourths of the existing members.

The capital of every company is represented by a certain amount of stock, or a certain quantity of shares, each having a certain number affixed to it in the books of the company. The difference between the two is merely a formal one. In the latter case the whole capital is regarded as sub-divided into certain fixed amounts of, e.g., five, ten, or one hundred pounds, whereas in the former case it is not. Thus, although one hundred pounds stock in the one case, and a single share in the other are the units adopted, for convenience sake, in estimating their market value, stock may be transferred in fractional parts, as well as multiples, of one hundred pounds, whereas fractions of shares are not recognized.

Both shares and stock are alike personal property (d).

Every company is bound to keep a register (e) in which the names of its members, that is, of the proprietors of its stock or shares, must be entered. The person whose name

Shares and stock.

The register of members.

(z) *Ibid.* s. 15.

(a) *Ibid.* s. 16.

(b) *Ibid.* s. 17.

(c) *Ibid.* ss. 51, 53, 54.

(d) *Ibid.* s. 22.

(e) *Ibid.* s. 25.

is so entered, and that person only, will be recognised as the owner of the stock or shares standing in his or her name; for *no notice of any trust, express or implied, or constructive, is allowed to appear upon the register* (*f*). That is to say, that if the person whose name appears upon the register be in fact a trustee, he will (though this of course does not affect his duties to his *cestui que trust*) be regarded, as between himself and the company, as holding the stock or shares “in his own right.”

Certificate of
shares or
stock.

Every shareholder receives a certificate under the common seal of the company, specifying the stock or shares held by him; and this document is *prima facie* evidence of his title thereto. It must be produced and handed over upon the occasion of a transfer of the property, which is usually effected by a deed registered at the company's office. A new certificate is then made out for the new proprietor. But by the Companies Act of 1867 it is provided (*g*) that with respect to shares fully paid up, or to stock, *share warrants* may be issued entitling the bearer to the shares or stock therein specified, which accordingly become transferable by mere delivery of the warrant.

“Winding-
up.”

It is most commonly in connection with the insolvency of a company, and the questions thereupon arising between the corporation and its contributories, that its affairs become the subject of judicial investigation. By the Act of 1862, provision is specially made for what is called the “winding-up” of the affairs of companies either by the Court or of its own accord (*h*); that is, either compulsorily, upon the petition, for example, of a creditor—a process similar to the adjudication of bankruptcy in the case of an individual—or voluntarily at the request of the company itself, expressed by a resolution to that effect. In the latter case the Court merely makes an order that the winding-up be continued under the supervision of the Court.

Compulsory
or voluntary.

(*f*) C. A. 1862, s. 30.

(*g*) C. A. 1867, ss. 27—33.

(*h*) C. A. 1862, ss. 79—128.

The business of the "winding-up," that is, the conclusion of the company's transactions, and the calling in and realisation of its assets, is intrusted to an official appointed for the purpose, who is styled a liquidator, and if he be appointed by the Court, an "official" liquidator (*i*). Appointment of liquidator.

The liability of the members of the company in the "winding-up" is regulated upon the principles which have been already laid down, and such liability is of the nature of a specialty debt. Existing members are of course primarily liable; but if the Court be satisfied that they will be unable to satisfy the contributions required from them, then all persons who have been members of the company within a period of one year from the date of the winding-up, are held liable, subject, of course, in the case of a limited company, to the restriction above mentioned, for the debts and liabilities contracted by the company during the period of their membership (*k*). It is also to be noticed that *unregistered* companies, that is, partnerships and other associations (except railway companies incorporated by Act of Parliament), consisting of more than seven members, may be compulsorily wound up in the same manner as registered companies (*l*). Liability of members past and present.

Thus, industrial and provident societies (*m*), friendly societies, building societies (*n*), and other similar institutions, may be wound up under this Act; such business being specially assigned to the equitable jurisdiction of the County Court. A building society can only be wound up upon petition by at least three-fourths of its members present at a meeting, or by a judgment creditor for not less than 50%. Life assurance companies are governed by the Life Assurance Companies Act, 1870 (*o*). Winding-up of unregistered companies.

A foreign company having a *branch office* and assets Friendly and industrial societies, &c.

(*i*) C. A. 1862, ss. 92, 97, and Societies Act, 1876 (39 & 40 Vict. 133—144. c. 45), s. 17.

(*k*) *Ib.* s. 38, sub-ss. 1—7.

(*l*) *Ib.* s. 199.

(*m*) See Industrial and Provident

(*n*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 32.

(*o*) 33 & 34 Vict. c. 71.

and liabilities in England, may be wound up under the section of the Act dealing with unregistered companies(*p*), but not if its business be merely carried on by agents in this country(*q*).

II. *Important Principles of Law affecting modern Joint Stock Companies.*

The student who has followed the above brief outline of the development, constitution, and principal incidents of a joint stock company, will now be prepared for a somewhat fuller discussion of the legal questions most commonly arising in relation to its internal management, and the rights and liabilities of the various parties concerned therein.

Nature of a modern company.

A corporation at common law has been defined above as a "legal personage," and the same definition may be correctly applied in particular to the modern company. But the term must not be taken to describe exhaustively the peculiar characteristics of an institution which is essentially the creature of statute. A joint stock company, for the purposes for which it has been called into existence, acts by the determinations of the "domestic tribunal" constituted within it (*r*), that is, by the resolutions passed by a majority of its members, and carried out by its servants and agents, with all the rights and capacities of an individual. Thus, to the external world the company presents the appearance of a single *persona*—that *persona* being the shareholders viewed in the mass. But it is most important to remember that each individual shareholder may, in his private capacity, appear *pro tempore* as an outsider, merely connected with

Its internal and external relations.

(*p*) Companies Act, 1862, s. 199 ;
In re Matheson Brothers, 27 Ch. D.
225.

(*q*) *In re Lloyd Générale Italiano*,
29 Ch. D. 219.

(*r*) *In re Suburban Hotel Co.*, L.
R. 2 Ch. 737 ; followed in *Re Lang-*
ham Skating Rink Co., 5 Ch. Div.
669.

the company by some contractual obligation, and assert his private rights against the rest of the shareholders. Nor must it be supposed that in all cases a "majority" of the latter can be taken to represent the "company," or will be allowed the absolute control of its affairs; for although, of course, owing to the very nature of a corporate institution, this must as a rule be the case, the Court will interfere to protect a minority whose rights are being unfairly overridden (s), on the application of one of their number. Again, the student must distinguish the right of an individual, or of several individuals (such as, for instance, a minority in the case just mentioned), against the company collectively, from the rights of the same persons as members of the company against the directors or promoters of the company personally. Again, the directors may be liable in several ways: either *to the company*, (1) as agents who exceed the powers intrusted to them, as in the case of an "*ultra vires*" act on their part; or (2) in their fiduciary relation, as trustees or quasi-trustees for the shareholders collectively; or, again, *to the individual shareholder*, or even to strangers, when they have been guilty of fraud or misrepresentation by which their interests have been injuriously affected. On the other hand, it must be remembered that, with regard to the outside public, the acts of the directors, if within the scope of their authority, will bind their principals, so that the liability of the directors will in such cases be often only another word for the liability of the company and of the shareholders generally.

In dealing with so large a subject, every effort has been made to leave out of sight questions such, for instance, as those relating to the formal organization of the company, or to practice and procedure, to which a mere reference to the statute generally provides an adequate answer, and to discuss principally those to which distinctively legal or equitable doctrines, acting in many cases conjointly

Scope of the following chapter.

(s) *Menier v. Hooper's Telegraph Works*, 9 Ch. 350.

with the provisions of statute law, have to be applied. The utmost that can be attained in so small a space will be to leave the student in possession of the main principles governing cases of the latter class, and by references to a careful selection of important modern decisions, to put him in the way of acquiring that fuller knowledge of the subject which will enable him to deal with questions of a more complicated or more exceptional nature. It has been found convenient, without adopting any particular order beyond that suggested by the subject itself, to divide it into the following heads, viz. :—

1. *The Liabilities of "Promoters" of Companies.*
2. *The "Prospectus" of the Company; and the effect of Misrepresentations contained in it.*
3. *The Doctrine of "Ultra Vires."*
4. *Allotment and Acceptance of Shares.*
5. *The Transfer, Forfeiture, &c. of Shares.*
6. *The Payment of Dividends.*
7. *Directors—their Duties and Liabilities.*
8. *The "Winding-up" of Companies.*

1. *The Liabilities of Promoters.*

Who are promoters.

Persons who exert themselves for the purpose of forming and floating a company, are said, in legal phraseology, to "promote" it. The meaning of the term is hardly capable of exact definition; but it may be taken to include all the acts and transactions usually involved in "floating" the company, that is, in securing the subscription of the shares which are to constitute its capital (*t*), or, for example, the purchasing of property, followed by the creation of a company to which it is intended to be sold. All persons who, in performing such acts, place themselves in a certain

(*t*) *Emma Silver Mining Co. v. Lewis*, 4 C. P. D. 396.

relation to the company, are held to be its "promoters," and as such to be in a fiduciary relation towards it (u). It is possible for a vendor not to assume such a relation, but to keep the company, as it is said, "at arms' length." Not every vendor, therefore, is a promoter. This is a principle both well established and easily intelligible; for all the arguments which would apply as between trustee and *cestui que trust*, or between principal and agent, are, *a fortiori*, applicable to the peculiar case of the promoter who selects, and, in fact, creates, his own *cestui que trust* or principal, since the company has no choice as to who should call it into existence (x). Thus, any concealment of material facts in relation to the property purchased by the company, and any *secret profits* made by the promoter upon the sale, much more any actual fraud on his part, will afford grounds on which the company may obtain a rescission of the transaction, or an order against the promoter to refund his improper gains; the company being entitled to appropriate to itself all advantages and profits obtained by the promoter without its knowledge in the formation of the company.

Their duties
and liabilities.

2. The Prospectus—Misrepresentation.

The first step which directly concerns the public in the formation of a company is the issue of a prospectus, a printed notice announcing the nature, object, and the prospects of the company. The alleged misrepresentation of facts in this document is a frequent subject of litigation.

The pro-
spectus.

In the first place, if the dates of and parties to all contracts entered into by the company, or its directors, promoters, or trustees at the date of the issue of the prospectus, be not fully stated therein, such omission will,

Suppression of
contracts.
Companies
Act, 1867.

(u) *New Sombrero Phosphate Co.*
v. *Erlanger*, 3 App. Cas. 1218; *Bagnall* v. *Carlton*, 6 Ch. D. 371.

(x) *Buckley on Companies*, 4th
ed. 509.

ipso facto, give each of the shareholders a right of action against the authors of the prospectus personally (y).

Misrepresentation.

But this special "statutory" fraud does not diminish the general rights of the individual or of the corporation upon the common law ground of deceit and misrepresentation. It will suffice to say that a prospectus is in this respect like any other representation made by one party to another. If the statements therein contained be false in any material point, and the plaintiff in reliance upon them has contracted an obligation, or in any way acted to his own detriment, he can either rescind his agreement to take shares, or recover damages from the authors of the misrepresentation (z). It is to be observed, however, that mere "puffing" expressions of opinion contained in a statement of the prospects of the company, and loose assertions of hope and belief, will not as a rule be held to amount to a positive representation (a), although they may do so under certain circumstances, where the party making them knows, and is known to know, the facts (b).

"Puffing" expressions.

"Actual" fraud.

The plaintiff is not bound to prove that the misrepresentation was made with any actual fraudulent intent (b), although this will sometimes be implied in the case of reckless assertions of facts which would be material; but, on the other hand, he must show that he has suffered injury; and unless he can show that he was deceived by it, it will be useless for him to prove any amount of fraud on the part of the defendants. The limitations of the plaintiff's right in this respect were clearly laid down by the House of Lords in the recent case of *Smith v. Chadwick* (c), in which it was held, that where the representations contained in a prospectus were capable of more than one interpretation, it was for the plaintiff to say what construction he put upon them; nor would it be enough

Plaintiff must have been deceived.

Smith v. Chadwick.

(y) Companies Act, 1867, s. 38.

(z) *Arkwright v. Newbold*, 17 Ch. D. 301; *Peck v. Derry*, 37 Ch. D. 541.

(a) *Bellairs v. Tucker*, 13 Q. B. D.

562.

(b) *Smith v. Land and House Property Corporation*, 28 Ch. D. 7.

(c) 9 App. Cas. 187.

for him to show that the statements were inaccurate and, generally speaking, of a misleading character, unless he himself was in fact misled by them. And if, either by reason of his private knowledge of the matter, or for any other reason, he individually was not so misled, the fact that other persons in his position *very well might have been*, will be totally immaterial. The Court will not, it was expressly said, allow a plaintiff who has in fact been a party to a speculation, "to convert his speculations into certainties at the expense of other people" (*d*). The student must therefore remember that, though the fact of misrepresentation gives the plaintiff a *primâ facie* right to a remedy in damages or rescission of his contract, the onus is always upon him to prove that he was deceived by the statements in the prospectus. It is only necessary to add that "laches" or acquiescence on his part will, in this as in other cases, debar him from the assertion of his *primâ facie* rights (*e*).

3. *The Doctrine of "Ultra Vires."*

It has been laid down as a general principle of jurisprudence that the governing body of a corporation can only employ its funds for the purpose for which they were contributed (*f*). To employ them for any other purpose is said, in legal phraseology, to be "*ultra vires*." But according to the law governing modern companies, an act or transaction may be "*ultra vires*," and so illegal, in two ways—(1) as contrary to the memorandum of association of the company; (2) as contrary to the articles.

The memorandum must, as has been said, define *inter alia* the objects for which the company has been formed. The company has a legal existence only for the perform-

"*Ultra vires*."

(1) Under the memorandum of association.

(*d*) *Smith v. Chadwick*, 29 Ch. D. 459, *per* Jessel, M. R.

(*f*) *Pickering v. Stephenson*, 14 Eq. 322.

(*e*) See Introduction, p. 15.

*Ashbury v.
Riche.*

ance of those objects. Thus, in the leading case of *Ashbury Railway Carriage and Iron Co. v. Riche* (*g*), where the directors of a company entered into a contract relating to the laying down and the working, by means of a foreign association formed for the purpose, of a foreign railway, which contract was held to be without the somewhat large powers conferred upon the company as manufacturers of railway carriages, plant, &c., and "general contractors," it was held that the contract, being of a nature not authorised by the memorandum of association, was "*ultra vires*" not only of the directors, but of the whole company, so that the subsequent assent even of the whole body of shareholders could not ratify it. The principle emphasized by this decision is one which it is important to keep in mind, viz., that a company created under the Act of 1862 has not the general common law rights of a corporation, but only those which are defined in the legal document from which it derives its existence. This—the memorandum required by the Act (*h*)—is the "charter of the company," and its provisions can only be departed from in certain specified cases (*i*).

(2) Under the articles of association.

But the "articles of association," which are the more detailed regulations for the management and working of the company, are not of so sacred and unalterable a character as the "memorandum." Thus, a contract entered into by the directors of a company contrary to the provisions of its articles, though it is not *primâ facie* binding on the company (since it is a transaction exceeding the powers intrusted to them as agents of the corporation), may, if the assent be expressed with the natural formalities, be ratified by them, provided, of course, that, though contrary to the provisions of the articles of association, it is not contrary to those of the memorandum. Further, such ratification will be presumed where the shareholders are aware

Ratification.

(*g*) 7 L. R. H. L. 653; and see *London Financial Association v. Kelk*, 26 Ch. D. 107.

(*h*) C. A. 1862, s. 8.

(*i*) *Ib.* s. 12.

that the directors have exceeded their legal powers, and yet take no steps in the matter, but allow their conduct to remain unimpeached for years (*k*). But in the event of the shareholders of a company desiring to enlarge the scope of its business as defined by the memorandum of association, the only course open to them is a winding-up and reconstitution of the company.

4. *Allotment and Acceptance of Shares.*

The relation connecting the company and the shareholders arises upon the allotment and acceptance of shares. Where shares are allotted in the usual manner in answer to an application for the purpose, acceptance on the part of the applicant will generally be presumed unless he at once repudiates the shares assigned to him, with their attendant rights and liabilities. Upon the communication (*l*) to the applicant for shares of the allotment, there is *prima facie* a binding contract on his part to take the number of shares specified. But the contract is of course governed by the common law doctrines on the subject of proposal and acceptance; and if the application for shares be a conditional offer, and the company, that is, the directors, do not accept the condition, they cannot compel the applicant to accept the shares. Thus, if a tradesman or contractor offers to take 300 shares in a company on condition that certain business or a certain contract shall be given him (*m*), or that the subsequent calls upon the shares be set-off against goods to be supplied by him (*n*), the contract will not be completed by the mere unconditional allotment to the

Allotment.

Conditional offer to take shares.

(*k*) *Houldsworth v. Evans*, 3 L. R. H. L. 263.

(*l*) *I. e.*, on the posting of the letter of allotment; *In re Imperial Land Co. of Marseilles, Townsend's Case*, 13 Eq. 148.

(*m*) *In re Aldborough Hotel Co., Simpson's Case*, 4 Ch. 184.

(*n*) *In re Rolling Stock Company of Ireland, Shackleford's Case*, 1 Ch. 567.

Conditional
allotment.

applicant of the 300 shares; and should the directors put his name upon the register of members as a shareholder, he will be entitled to an order for its removal. And so in the converse case, where the allotment made in answer to an unconditional offer to take shares is coupled with a condition, the shareholder may be entitled to withdraw his application for shares (o); and an unreasonable delay in making the allotment will have the same effect (p).

Fraud.

Moreover, soon after acceptance of the shares, an applicant who has been induced to become a shareholder by fraud of the directors will have a good defence to an action by them for the "calls" due upon his shares, if within reasonable time after the discovery of the fraud he has been careful to repudiate the shares together with all the rights, benefits, and liabilities that might accrue to him as a shareholder (q).

Invalid allot-
ment.

How and by what persons—*e.g.*, the whole board of directors or a committee of them—a valid allotment can be made depends upon the articles of association of the company (r). But it is to be noted that an irregularity in the issue of shares does not always and necessarily invalidate the allotment. For instance, in the case of shares which are upon the face of them legally transferable, an irregularity in the issue, *which the original holder had no reason to suspect*, cannot be set up against him, and much less against a *bonâ fide* transferee for value without notice, by the company. In such cases the latter are held to be "estopped" by their conduct from questioning the validity of the issue, although according to the articles it may have been invalid (s).

(o) *In re Warren's Blacking Co.*,
Pentelow's Case, 4 Ch. 178.

(p) *In re Bowron*, *Baily & Co.*,
Baily's Case, 3 Ch. 592.

(q) *Bwlek-y-Phum Lead Mining*
Co. v. Baynes, 2 Ex. 324.

(r) *In re Imperial Land Co. of*
Marseilles, *Harris's Case*, 7 Ch. 587.

(s) *In re Romford Canal Co.*,
Re Pocock's Claim, 24 Ch. D. 85;
and see *In re Scottish Petroleum Co.*,
23 Ch. D. 414.

5. *Transfer, Forfeiture, &c. of Shares.*

The relation of "shareholder" in an existing company Transfer. is generally extinguished, either entirely or *pro tanto*, by the assignment or transference of the whole or part of his shares by the holder to some other person, who thereupon becomes a member of the company in his place. The shareholder may sell and transfer his shares as he pleases, subject to whatever liability for calls attaches to them. The deed of transfer, however, must state the consideration and the name of the transferee, and must be registered at the company's office. The directors of the company are Registration. *prima facie* bound to allow the registration of every *bonâ fide* transfer presented for the purpose, unless special powers to the contrary are conferred upon them (*t*). It is not unfrequently provided by the articles of association that transfers by shareholders who are indebted to the company shall be refused registration (*u*), and the Court will not allow such a provision to be evaded; *e.g.*, by a shareholder persuading the directors at a board meeting to postpone the "call" which would make him the company's debtor, and then taking advantage of the postponement to transfer his shares to a pauper in order to escape liability. In such a case the Court declined to remove the fraudulent transferor's name from the register of members, and to substitute that of the transferee (*x*). And, generally, the Court will "rectify" the register (*y*), in the case of fraudulent transfers which have been completed and entered thereon, by restoring the name of the original holder and removing that of his transferee (*z*). In adjudicating upon these questions a Court of equity is not bound always to

(*t*) *In re Smith, Knight & Co.*, 2 Ch. 685.
Weston's Case, 4 Ch. 20.

(*u*) *Exp. Stringer*, 9 Q. B. D. 436;
 see *Bradford Banking Co. v. Briggs*
 & *Co.*, 31 Ch. D. 19.

(*x*) *In re National and Provincial*
Marine Insurance Co., *Exp. Parker*,

(*y*) See Companies Act, 1862,
 s. 35.

(*z*) *In re Bank of Hindustan,*
China and Japan, Exp. Kintrea, 5
 Ch. 95.

follow what a Court of law would do in such a case, but will act upon the equitable principles applicable to the particular case (z), and will not allow one member of the company, by a mere evasion of his own liabilities, to increase those of the other contributories past and present (a).

Rights of transferee.

It is to be observed that, in the common case of a transfer of shares by sale upon the Stock Exchange, there is no implied undertaking by the vendor that the transfer which he is prepared to execute will, when it is presented at the company's office, be registered; and in the event of the directors declining, for any of the above reasons, to register it, the transferee cannot maintain an action against the vendor for the price of the shares (b).

Forfeiture and surrender of shares.

The articles of a company very commonly provide that the shares of members are to be forfeited upon non-payment of calls, the amount already paid up upon them being thus confiscated for the benefit of the company generally. Again, *dissenting* shareholders, *i.e.*, shareholders who are dissatisfied with the conduct and working of the company, are in some cases allowed, upon certain conditions, to retire from the company upon forfeiture of their shares.

Continuation of liability.

It might, perhaps, be expected that such forfeiture would *ipso facto* release them from all future liability as contributories in the event of the company being wound up; but it has been laid down in a variety of decisions that this is not necessarily so. For instance, where shareholders within a year before the winding-up transferred their shares, which were subsequently forfeited upon the transferees failing to pay the calls, the transferors were held liable, under the provision (c) which has been mentioned above, as past members (d); and it was expressly held in

(z) *In re National and Provincial Marine Insurance Co., Exp. Parker*, 2 Ch. 685.

(a) For a discussion of these principles, see *In re Smith, Knight & Co., Hakim's Case*, 7 Ch. 296, note.

(b) *Stray v. Russell*, 1 E. & E. 888, 917; followed in *London*

Founders' Association v. Clarke, 20 Q. B. D. 576.

(c) Companies Act, 1862, s. 38, sub-ss. 1-7.

(d) *In re Accidental and Marine Insurance Corporation, Re Bridger's Case*, 4 Ch. 266.

a later case that the liability of a "past member" of a company, being purely the creation of the Companies Acts, arises quite independently of the fact that his shares may have been transferred to another person or extinguished by forfeiture (*e*). But it must be remembered that no person can be put upon the list of contributories as a past member until it has been actually ascertained that the present members are unable to satisfy the contributions required from them (*f*); that is to say, the utmost which can in the winding-up be demanded from the whole body of shareholders, past and present, is the amount then remaining due upon the shares of existing members. This amount may be defrayed by the existing members; if not, the deficiency must be made good by the past members, if it does not exceed their statutory liability (*g*).

It may be here observed that directors have, as a rule, no power to release shareholders who may wish to have their shares cancelled, nor (what often amounts to the same thing) to purchase or deal in the shares of the company, unless under the articles of association they are specially authorised to do so (*h*). The cancellation of shares is, of course, equivalent to a reduction of the capital of the company; but may, where such reduction is not contrary to the memorandum of association, be authorised by a resolution of the shareholders (*i*).

Surrender.

Purchase of shares by directors.

Cancellation.

6. *The Payment of Dividends.*

The natural and proper fund out of which dividends are payable is obviously that which represents the profits earned by the company in the prosecution of its trade or "Profits."

(*e*) *In re Blakely Ordnance Co.*, *Creyke's Case*, 5 Ch. 63.

(*f*) *In re Blakely Ordnance Co.*, *Needham's Case*, 4 Eq. 135.

(*g*) Under s. 38, sub-ss. 1, 2. See *Buckley*, p. 133.

(*h*) *In re United Service Co.*, *Hall's Case*, 5 Ch. 707; and *In re Dronfield Silkstone Coal Co.*, 17 Ch. D. 76.

(*i*) *Taylor v. Pilsen-Joel and General Electric Lighting Co.*, 27 Ch. D. 268.

business, but as to the exact meaning of the term "profits" question has frequently arisen.

What they
are.

"Profits" may be defined, according to the best authority, as the amount by which the ordinary business receipts exceed the expenditure, or rather so much of the expenditure as is properly chargeable to revenue account (*k*). The meaning of this is, that in estimating the actual "net profits" for any given period, those losses which are properly chargeable to revenue account, *i.e.*, those arising from depreciation, wear and tear of capital, plant, &c., must be made good out of revenue before any "profits" can be said to have been earned, or at least before the

Payment of
dividends out
of capital.

amount of them can be ascertained. It is clear, in fact, that if the "profits" be estimated without allowing for such losses, and a dividend be paid, then such dividend is paid not out of true profits, but out of capital, since it diminishes the funds which should have been devoted to the making good of the capital. It is equally obvious that the repetition of such a process would ultimately result in leaving the company with no capital at all, and consequently incapable of earning "profits" in any sense. The payment of dividends out of capital has consequently been often described as illegal; and although one or two recent decisions would seem to inculcate a contrary doctrine (*l*), leaving it to the shareholders of a company to determine out of what fund—whether capital or income—their dividend shall be paid, it may safely be asserted both that "a diversion of capital to such purpose is inconsistent with the Companies Acts," and that its legality is questionable even when authorised by the articles of association (*m*).

Illegal.

Debenture
capital.

But "share capital" must be distinguished in this respect from "debenture capital," that is, moneys raised by borrowing upon the security of the company's bonds.

(*k*) See Buckley on Companies, 4th ed., p. 458.

(*l*) See *Dent v. London Tramways Co.*, 16 Ch. D. 344; and *McDougall*

v. Jersey Hotel Co., 2 H. & M. 528.

(*m*) Buckley on Companies, 4th ed., pp. 462, 463.

It does not follow that the payment of dividends out of the latter would be illegal. "Debenture capital" is not, in fact, capital at all, in the proper sense of the word. It is available money raised by borrowing (*n*).

The improper payment of a dividend, like any other act of the company which is "*ultra vires*," will be restrained by injunction on an application by any of the shareholders of the company (*o*); but a mere simple contract creditor cannot maintain such a suit upon the ground that the fund for payment of his debt is thereby diminished. Injunction.

In the absence of any provision to the contrary, the members are entitled to the profits "in proportion to their shares" in the company, in fact, these are the words commonly employed in the articles of association. In accordance with an important recent decision (*p*), the phrase "in proportion to their shares" must be taken to mean "in proportion to the nominal value of their shares," irrespectively of what amount has been in each case paid-up upon them. Payment "in proportion to shares."

But a company may be empowered by its articles to issue preference shares. In such a case, if the profits of any one year are insufficient to pay the preference shareholders the dividend to which they are, under the articles of association, entitled, the deficiency may, as between them and the *ordinary* shareholders, be made good, at the expense of the latter, out of subsequent profits (*q*). "Preference" shares.

In the case of a sale and transfer of shares, all dividends declared after the completion of the contract, although they represent the earnings and are declared in respect of a period antecedent to the sale, belong to the purchaser (*r*). Sale of shares.

(*n*) Buckley on Companies, 4th ed. p. 463.

(*o*) *Hoole v. Great Western Rail. Co.*, 3 Ch. 262.

(*p*) *Oakbank Oil Co. v. Crum*, 8 App. Cas. 65.

(*q*) *Webb v. Earle*, 20 Eq. 556.

(*r*) *Black v. Homersham*, 4 Ex. D. 24.

7. Directors—*Their Duties and Liabilities.*

Position of directors.

Directors are the superior officials of the corporation which they represent. Their position is that of paid agents of the company (*s*). They are the “managing partners” (*t*) of the latter.

Their powers.

They have power to bind the company by any acts the object of which is not “*ultra vires*” of the company: that is to say, the scope of their employment as agents extends to all transactions upon which the company itself is authorised to enter.

The general authority of directors is held to cover all such acts as are reasonably necessary to the proper management of a business (*u*). Thus, they may, if they think proper, in a prosperous year give gratuities to the company’s servants (*x*). But the company itself cannot authorise such an act if it has, *e.g.*, transferred its business, or is on the point of being wound up, since the grant could not be said to be one made in the interests of the company (*y*).

Their liability.

The directors, however, have a double character. They are, as has been said, agents for the company, and in this respect their liability is, of course, to be determined by the law of Principal and Agent. A director cannot be made personally liable on a contract entered into on behalf of the company; but they are also, in a sense (*z*), trustees for the shareholders of the powers entrusted to them, *e.g.*, those of allotting shares, approving transfers, making calls upon shares, and generally of dealing with the funds of the company, in so far that for the abuse of any of these they may be rendered personally liable. Thus in a case where

“As trustees” of their powers.

(*s*) *Charitable Corporation v. Sutton*, 2 Atk. 400 (1742).

(*t*) *Re Forest of Dean Coal Co.*, 10 Ch. Div. 450, 451.

(*u*) See, *e.g.*, *Re West of England Bank, Exp. Booker*, 14 Ch. D. 317.

(*x*) *Hampson v. Price’s Candle Co.*, 34 L. T. 711.

(*y*) *Hutton v. West Cork Rail. Co.*, 23 Ch. D. 654.

(*z*) See remarks of James, L. J., in *Smith v. Anderson*, 15 Ch. D. 247, 275.

"promotion money" was, upon the first allotment of shares, to be paid to the promoters, and the directors prematurely allotted shares, and paid £5,000 to the promoters, who immediately paid to the directors £500 a piece, in the winding-up of the company re-payment of that £500 was ordered from each of the directors (*a*). In general the principle applied will be seen to be, that the director may make no profit out of his position as the agent of the company, whether such profit involve a direct loss to his principals or not, without the express sanction of the latter.

It has been already said that where the shareholders are aware that the directors are exceeding their legal powers, and take no steps in the matter, they will be taken to have sanctioned what has been done: yet in order to establish this presumption evidence of knowledge, or of the means of knowledge of the facts, must be brought home to each individual shareholder: and *it is no part of the shareholder's duty to look personally into the management of the business*. He is entitled to assume that the directors to whom such management has been entrusted are conducting it properly (*b*).

It is hardly necessary to say that the directors are liable for their own fraudulent acts; and the company will not be bound by a fraudulent and illegal agreement entered into by the directors on its behalf (*c*). But the case may be different where, *c. g.*, the fraudulent act or misrepresentation has been made upon the company's behalf (*d*), and has induced a third party to contract with the company. The company, moreover, will be liable for the false and fraudulent misrepresentations of an agent acting in the course of its business (*e*).

For fraudulent acts.

(*a*) *Madrid Bank v. Pelly*, L. R. 7 Ex. 119, 7 Eq. 442.

(*b*) *Stanhope's Case*, 1 Ch. 161; and see, also, *Ashbury Carriage, &c., Co.'s Case*, 7 L. R. H. L. 653.

(*c*) *British American Telegraph Co.*

v. Albion Bank, L. R. 7 Ex. 119, 122.

(*d*) *Western Bank of Scotland v. Addie*, L. R. 1 H. L. Sc. 145, 157.

(*e*) *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259.

For negligence.

A director is also liable for negligence in the performance of his duties (*f*). But mere imprudence in the exercise of his powers will not subject him to personal responsibility, unless the imprudence be so manifest as to amount to "*crassa negligentia*," for directors acting as the company's agents are only bound to use the same prudence as they would exercise under the same circumstances on their own behalf; and if authorised to do an act in itself imprudent, they are not to be held responsible for its consequences (*g*), nor will the Court visit directors with the consequences of a mere error of judgment if they have acted *bonâ fide* and intending what was best for the interests of the company.

Appointment of directors.

The subscribers of the memorandum of association have generally the powers of directors, and must, in fact, have them until they have appointed other persons to the office (*h*); and the signature of two out of the seven original subscribers of the memorandum has been held to give a *primâ facie* authority to an agent to bind the company (*i*).

Qualification.

It was provided by a former Act of Parliament (*k*) that every director should hold at least one share in the company, but the Statute of 1862 contains no such provision. Where, however, as is almost always the case, the articles of association require that every director shall be the holder of a certain number of shares, then the acceptance of those shares becomes a necessary qualification for the office of director, and will, in fact, be implied, in the absence of evidence to the contrary, from the mere acceptance of the office. Thus a subscriber of the memorandum who becomes thereby an *ad interim* director, will be taken to have agreed

(*f*) *Re General Light Co.*, *Marzetti's Case*, 28 W. R. 541.

(*g*) *Overend and Gurney Co. v. Gibb*, 5 L. R. H. L. 480; and see *Turquand v. Marshall*, L. R. 4 Ch. 376.

(*h*) *Re Brighton Brewery Co.*, *Hunt's Case*, 37 L. J. (Ch.) 278,

280. See Sched. I. to Companies Act, 1862, Table A., Arts. 52, 53.

(*i*) *Totterdell v. Farcham Brick and Tile Co.*, 1 L. R. C P. 674.

(*k*) 7 & 8 Vict. c. 110, s. 28. See Buckley on Companies, 4th ed. p. 46.

to accept the necessary qualification, and is in duty bound to insert his own name as a shareholder of the amount specified, upon the register (*l*). By the Companies Act of 1862 (*m*), and generally by the articles of association, it is provided that any defect afterwards discovered in the appointment or qualification of the directors, managers, &c., of a company, shall not invalidate their past acts, the general effect of which provisions may be taken to be that where the business of a company is conducted in an ordinary business-like manner, those persons who are allowed to hold themselves out to the public as its agents or managers, will, whether properly appointed or not, have all the powers of such agents, &c. to bind the company, that is, that “*as between the company and persons having no notice to the contrary, directors de facto are as good as directors de jure*” (*n*), at least until the invalidity of their appointment is established (*o*).

The payment of directors is a matter to be determined by the company in general meeting. Not being in the position of ordinary employèes they are not entitled to claim remuneration according to the value of their services (*p*). Nor even when the articles authorise them, for example, to pay all the preliminary expenses of the formation of the company, can they maintain an action at law for the recovery of such expenses from the company (*q*), although they may have an equitable claim in so far as the company has derived benefit from the expenditure (*r*).

What number of directors acting together have power to exercise the various functions, *e. g.*, of allotting shares, making “calls,” &c., and to bind the company by their acts, is a matter to be determined by a reference to the

Remuneration.

Quorum.

(*l*) *Sidney's Case*, L. R. 13 Eq. 228; but see *In re Colombia Chemical Factory and Works, Hewitt's Case*, 25 Ch. D. 283.

(*m*) s. 67.

(*n*) *Mahony v. East Holyford Mining Co.*, L. R. 7 H. L. 869.

(*o*) *Re Bridport Old Brewery Co.*, L. R. 2 Ch. 191.

(*p*) *Dunston v. Imperial Gaslight Co.*, 3 B. & Ad. 125.

(*q*) *Melhado v. Porto Alegre Co.*, L. R. 9 C. P. 503.

(*r*) *Re Hereford Waggon Co.*, 2 Ch. Div. 621.

articles. Where, however, these do not prescribe what proportion of the whole board of directors shall form a "quorum," it has been decided that the number who usually act together for the company must be taken to constitute one (*s*).

Delegation of powers.

A director being an agent cannot delegate his powers except in so far as he is specially authorised to do so (*t*), for "*Delegatus non potest delegare*." But most companies' articles authorise such delegation of the director's powers, *e.g.*, of allotment to a committee of some of their own number (*u*); and there being such power, delegated authority will be presumed when one or two of the delegate directors act by themselves in a matter properly within the ordinary business of the company (*x*).

8. *Winding-up*.

The dissolution of the company as a working and trading corporation may be brought about, as has been already said, in one of two modes: that is, either by a voluntary or compulsory "winding-up" of its affairs.

Compulsory winding-up.

An order for the compulsory winding-up of a company may be obtained from the Court generally whenever such winding-up seems "just and equitable" (*y*). Such an order is commonly made when the company has not commenced business for a year after its incorporation, or suspends its business for a whole year, or is unable to pay its debts (*z*), and in certain other cases (*z*) upon petition presented for the purpose, after notice thereof by advertisement (*z*), such petition to be presented either by the

Who may petition.

(*s*) *In re Tavistock Ironworks Co., Lyster's Case*, 4 Eq. 233.

(*t*) *In re County Palatine Loan and Discount Co., Cartnell's Case*, 9 Ch. 691; and see *Harris's Case*, L. R. 7 Ch. 587.

(*u*) See Table A., Art. 68.

(*x*) *Totterdell v. Fareham Brick, &c. Co.*, L. R. 1 C. P. 674.

(*y*) Comp. Act, 1862, s. 79, sub-s. 5.

(*z*) As to which see Comp. Act, 1862, s. 80; Buckley Comp. p. 193.

company itself, or by any creditor, or by any contributory Contributory.
 who has been the holder of shares for a period of at least six months during the eighteen months immediately preceding the winding-up (b). The assignee of debentures of the company which are secured by a trust deed—the company assigning all their property to trustees for the benefit of the debenture holders—may apply for a winding up order on the ground that the interest on the debentures is in arrear (c). But the holder of a *share warrant* may not petition (d). On the other hand, any unpaid creditor Creditor.
 of a company which is in fact in a state of insolvency, is *prima facie* entitled as of right to such an order (e); but where the petitioner can gain nothing by it, or acts out of mere malice, and *à fortiori* where the other creditors object, such an order will not be made, nor if the petitioner's debt be of insignificant amount or be *bona fide* disputed by the company, or if no satisfactory evidence be adduced of the company's insolvency (f).

The reasons which will induce the Court to make a Grounds of
petition.
 “winding-up” order, in so far as the making of such an order is left entirely to their discretion under the “just and equitable” clause, cannot be exactly defined; but the Court will be loth to decide in the absence of any evidence of insolvency, suspension of working, &c., and especially at the instance of a shareholder, that the company shall not be allowed to carry on its business (g). For the shareholder has by his right of attending meetings, voting, &c., a certain power of control over the affairs of the company, and mere mismanagement or misapplication of the funds Mismanagement.
 on the part of the directors will not, until it has produced insolvency, give the Court authority to wind up the com-

(b) Unless the shares have devolved upon him by the death of a former holder. See Comp. Act, 1867, s. 40.

(c) *In re Olathe Silver Mining Co.*, 27 Ch. D. 278.

(d) *Re Positive Assurance Co.*,

W. N. (1877) 23.

(e) *In re Chapel House Colliery Co.*, 24 Ch. D. 259.

(f) *In re Gold Hill Mines*, 23 Ch. D. 210.

(g) *Re Langham Skating Rink Co.*, 5 Ch. D. 669.

pany, though such misconduct might be the subject of an action (*h*). Nor will an "*ultra vires*" act meditated by a majority of the company, for that may be restrained, on the application of an individual shareholder, by injunction (*i*). But if the business of the company be one which circumstances have made it impossible to carry on, the Court will order a winding-up (*k*).

Who are contributories.

"Members."

It has already been observed (*l*) that, both present and subject to certain restrictions, *past* members of the company are liable as contributories in the winding-up to the extent of the amount unpaid upon their shares, or which they have guaranteed to pay (*m*). The determination, however, of the important question who are "members," past or present, of the company is not always a simple matter. Persons who have signed the memorandum may *prima facie* be taken to be members, although there are cases where the signature has been held not to involve such liability (*n*). On the other hand, where a person in the position of a promoter allows himself to be represented as a director and shareholder on the prospectus, it will be immaterial that his signature is not actually attached to the memorandum (*o*). The Companies Act (*p*) defines as a member "anyone who has agreed to become a member;" and under this section a director who accepts an office to which "membership," or the holding of a certain number of shares, is a necessary qualification, will, as a general rule, be held to have so agreed (*q*). And it must be remembered generally, that "a man may become a contributory to a company *by his acts*" (*r*), without legal membership. It

(*h*) *Re Anglo-Greek Steam Co.*, L. R. 2 Eq. 1.

(*i*) *Re Irrigation Co. of France*, *Exp. Fox*, L. R. 6 Ch. 176, 184.

(*k*) *In re German Date Coffee Co.*, 20 Ch. D. 169.

(*l*) See p. 595, *supra*.

(*m*) Comp. Act, 1862, s. 38, the precise effect of which upon the two classes of contributories is

elaborately discussed. Buckley on Companies, 4th ed. p. 128.

(*n*) *Smyth's Case*, I. R. 2 Eq. 673.

(*o*) *Palmer's Case*, I. R. 2 Eq. 573.

(*p*) Comp. Act, 1862, s. 23.

(*q*) *Miller's Case*, see remarks of Jessel, M. R., 3 Ch. D. 665.

(*r*) *Spackman v. Evans*, L. R. 3 H. L. 171, 208.

may be added that the members of the company, in respect of their right as members to dividends or profits, cannot compete in the winding-up with the outside creditors of the company (s).

The effect of an order for the winding up of the company can only be learnt in detail from a perusal of the sections of the Act (t); but it may be said generally, that from the moment of the making of the winding-up order, the company has no legal existence except for the purpose of bringing its affairs to a speedy conclusion in the manner best calculated to promote the interests of the creditors. The liquidator—whether official or otherwise—who represents the company for the purposes of the winding-up is practically empowered to do all acts conducing to the above result. Thus, it may be mentioned that, although the winding-up order is in itself a notice of discharge to the servants of the company (u), the liquidator may waive this notice by continuing to employ them, in a case where the immediate cessation of the company's business would be improper and injurious, in which case the employes continue in their position under the original contract with the company, and are entitled to notice of discharge in pursuance thereto (x). In general, the same principle applies to all the contracts of the company. If the liquidators elects to continue them, they are continued (y), with all the incidents belonging to them. But a most important principle to be kept in mind is that the property of the company, wherever situated, becomes, from the date of the winding-up order, *the property of its creditors* (y). The company suffers bankruptcy.

And by the Supreme Court of Judicature Act, 1875 (z), it has been provided, that in the winding-up under the

Effect of winding-up order.

Discharge to company's servants.

Contracts generally.

Rules of Bankruptcy to be observed.

(s) Comp. Act, 1862, s. 38, sub-s. 7.

(t) *Ibid.* ss. 79—128.

(u) *Chapman's Case*, L. R. 1 Eq. 346.

(x) *Re English Joint Stock Bank, Exp. Harding*, L. R. 3 Eq. 341.

(y) See *Wiltshire Iron Co. v. Great Western Rail. Co.*, L. R. 6 Q. B. 101.

(z) 38 & 39 Vict. c. 77, s. 10.

Companies Acts of 1862 and 1867, of any company whose assets prove insufficient for the payment of its liabilities, the rules applied to individuals under the law of bankruptcy shall, to a certain extent, apply in the case of bankrupt companies. The effect of this enactment is, that with regard to companies wound up *since November, 1875* (*x*), the rights of secured and unsecured creditors respectively, and the rules as to priority of claims against the assets of the company (*y*), and as to the administration of those assets generally (*z*), are to be determined by a reference to the Bankruptcy Act for the time being: the claims of creditors against the estate of a bankrupt individual, or of a bankrupt company, being thus put upon the same footing: though, with regard to the property available for distribution, there would still be important differences (*a*).

(*x*) *In re Joseph Suche & Co.*, 1 Ch. D. 48.

(*y*) *Williams v. Hopkins*, 18 Ch. D. 370, 377.

(*z*) *Re Albion Steel Co.*, 7 Ch. D. 547—549.

(*a*) *Re Withernsea Brickworks*, 16 Ch. D. 337, 341. As to the general principles of administration of estates of insolvent companies, see *In re Dronfield Silkstone, &c. Co.*, 23 Ch. D. 511.

CHAPTER V.

PARTITION AND THE SETTLEMENT OF BOUNDARIES.

THE jurisdiction of equity with respect to both partition and the settling of boundaries originated in the insufficiency of the common law remedy. As regards partition it is true that proceedings might be taken at common law by writ of partition; but they were at a very early period found to be inadequate and incomplete. Various and complicated interests are often attached to the ownership of real estate, and when the titles were in any degree complicated, and discovery was needed to ascertain them, the processes of law were very inapt to deal with them. Moreover, Courts of law were content merely to declare the rights of the parties, and were incapable of enforcing a partition by means of mutual conveyances; nor could they regulate the appropriate and indispensable compensatory adjustments. For these and other similar reasons, equity assumed a general concurrent jurisdiction with Courts of law in all cases of partition. In so doing it usually followed the analogies of the law, and decreed partition in such cases as Courts of law recognised as fit for their interference. Equity, however, did not limit its jurisdiction to cases cognisable or relievable at law; there were many cases in which it interfered where law would not have done so—for instance, where an equitable title was set up. Now, by s. 34 of the Judicature Act, 1873, the jurisdiction in cases of partition, which was formerly common to Courts both of law and equity, is assigned exclusively to the Chancery Division of the High Court.

Origin of
jurisdiction.
In partition.

In settlement
of boundaries.

With respect to the settling of boundaries, different origins have been alleged for the jurisdiction. It is undoubtedly as old as the reign of Elizabeth; but whether arising from the intent to prevent multiplicity of suits at law, or from the issuing of a commission at first by request or consent of the parties, and then on the application of one party who should succeed in establishing an equitable ground for requiring it, or whether it was founded by the chancellors upon the basis of the *actio finium regundorum* of Roman law, is disputed. Whatever its origin, the case of *Wake v. Conyers* well illustrates its present character and extent.

Compared.

It resembles the remedy of partition in that the relief in both cases is effected by similar machinery—namely, the issuing of a commission with authority to inquire as to the rights of the parties, and to settle them definitively—and for this reason the two subjects have been here classed together. They differ, however, conspicuously in that whereas partition is to those parties within its scope a matter of right, the commission to settle boundaries will not be granted unless it is claimed by virtue of some equity superinduced by the act of the parties. It is eminently dependent upon the discretion of the Court.

SECTION I.—PARTITION.

- I. *Who may claim Partition.*
- II. *What is subject to Partition.*
- III. *Mode of effecting Partition.*
- IV. *The Partition Acts.*
- V. *Costs.*

I. *Who may claim Partition.*

1. At common law co-parceners only had a right to Co-parceners, compel partition. By the Statute of Partition (*a*) joint joint tenants, tenants and tenants in common of any estate of inheritance tenants in common. in their own right, or that of their wives, might be compelled to make partition between them, and by 32 Hen. 8, c. 32, s. 1, joint tenants and tenants in common for lives or years are declared compellable to make partition in the same way.

2. A decree of partition is a matter of right, and it has been held to be no objection to a bill that the interests of all parties would not be finally bound by it. Consequently, a decree may be obtained either by or against a person having only a limited interest as a tenant for life (*b*), or a tenant for life determinable on marriage (*c*), or a tenant and for a term. and for a term. (*d*); and where there are remaindermen who may come *in esse* and be entitled, they will be bound by a decree made against the tenant for life (*e*).

A tenant in tail may also obtain a decree for a par- Tenants in tail. titution (*f*); and a partition between tenants in tail, though by parol, binds the issue (*g*).

(*a*) 31 Hen. 8, c. 1.

(*b*) *Gaskell v. G.*, 6 Sim. 643.

(*c*) *Hobson v. Sherwood*, 4 Beav.

184.

(*d*) *Baring v. Nash*, 1 V. & B.

551.

(*e*) *Wills v. Slade*, 6 Ves. 498.

(*f*) *Brook v. Hertford*, 2 P. Wms.

518.

(*g*) *Rose v. R.*, 2 Vern. 233,

cited.

Claimants
must be
entitled in
possession.

3. A person can only compel partition when entitled in possession. A bill was held not maintainable by a joint-tenant or tenant in common in reversion or remainder (*h*); nor could he, after bill filed, by acquiring possession and amending his bill, have put himself in a better position.

Prior to the Judicature Acts the Court of Chancery would not entertain a suit for partition where the legal title was in dispute, and its decision would in effect be an adjudication upon the legal right (*i*). But the same reasoning does not now apply, and the High Court has ample jurisdiction to entertain a suit for partition, though a question as to the legal title may be involved (*j*).

Mortgagees.

4. A mortgagee of an undivided share may sue for foreclosure and partition, and move for a receiver of the rents of the undivided share of the mortgagor (*k*). And an equitable tenant in common of lands in mortgage is entitled to partition as against his co-tenant, notwithstanding that he has possessed himself of the legal estate in the whole property by procuring a transfer of the mortgage (*l*).

Plaintiff must
show title.

5. The title of the plaintiff to an interest in the property of which he seeks partition must be shown (*m*). Where, however, there is only a small failure in the proof of title, or the interests of the parties in the property are uncertain, they may be ascertained by a reference, and under the old practice this must have been done previous to the commission issuing; for, as is laid down in *Agar v. Fairfax* (*n*), it was not the duty of the commissioners to ascertain the proportions and rights of the parties; their duty commenced when these were ascertained. Uncertainty as to the shares of the parties is, therefore, not an objection to partition, but only a ground for postponing it until such shares have been ascertained.

(*h*) *Evans v. Bagshaw*, 8 Eq. 469;
5 Ch. 340.

(*i*) *Ibid.*; *Giffard v. Williams*, 5
Ch. 546; *Slade v. Barlow*, 7 Eq.
296.

(*j*) *Waite v. Bingley*, 21 Ch. D.

674, 681.

(*k*) *Fall v. Elkins*, 9 W. R. 861.

(*l*) *Waite v. Bingley*, *sup.*

(*m*) *Cartwright v. Pultney*, 2 Atk.
380; *Jope v. Morshead*, 6 Beav. 213.

(*n*) 17 Ves. 533.

6. Upon the same principles as in cases of partition, Dowress. although dower was originally a mere legal demand, a widow, being a joint owner, became entitled in equity to an assignment of one-third of the lands of which her husband was seised in fee or in tail, which her issue might possibly have inherited. And since the Dower Act (*o*) the right applies as well to equitable as to legal estates.

Where the property in question is vested in trustees Trust for sale. upon trust to sell at their discretion, the Court has no jurisdiction to order a partition. In such a case the property is regarded in equity as converted into money, to which the remedy of partition has no application (*p*). But a similar reasoning does not apply where there is a mere power of sale (*q*).

II. *What is subject to Partition.*

1. Freeholds have been always subject to partition; Freeholds. but previous to 4 & 5 Vict. c. 35 (amended by 21 & 22 Vict. c. 94), the Court of Chancery, though it could decree specific performance of an agreement to divide copyholds (*r*), had no power to direct the partition of copyholds Copyholds. or of customary freeholds. It was given, however, by s. 85 of that Act (*s*).

2. Leaseholds, also, under 32 Hen. 8, c. 32, s. 1, were Leaseholds. subject to partition during the term, at the instance of the termor of an undivided share (*t*); but partition of leaseholds was refused where the landlord might immediately obtain an injunction to restrain the parties from executing it by any act amounting to waste, or where the

(*o*) 3 & 4 Will. 4, c. 105. See *Mundy v. M.*, 2 Ves. jr. 122.

(*p*) *Biggs v. Peacock*, 22 Ch. D. 284; 23 *ib.* 200; *Taylor v. Grange*, 15 *ib.* 165.

(*q*) *Boyd v. Allen*, 24 Ch. D. 622.

(*r*) *Bolton v. Ward*, 4 Hare, 530.

(*s*) *Hornecastle v. Charlesworth*, 11 Sim. 315.

(*t*) *Baring v. Nash*, 1 V. & B. 551.

Court could not protect one of the tenants in common from a breach of covenant which might be committed by the other (*u*).

Manor ad-
vowson.

3. A partition has been decreed of a manor (*x*) and of an advowson (*y*); in the latter case the right to present being sometimes given alternately, in others determined by lot (*y*). Under the present law, however, a sale would always be directed (*z*).

4. The Court has no power to decree partition of lands out of its jurisdiction, for instance, in Ireland (*a*). The principle of *Penn v. Lord Baltimore* (*b*) being limited to judgments *in personam*, evidently does not apply to such a dealing with the land itself as is involved in partition.

III. *Mode of effecting Partition.*

Commission,
when di-
rected.

1. It is not the ordinary practice for a commission to issue for the purpose of making a partition. If inquiries are necessary, it can be done in Chambers; if not, in Court at the hearing. There are many cases, however, in which a commission may still be directed to issue in accordance with the old practice of the Court, especially where the interests of parties under disability are concerned; but sometimes the Court would approve of a partition without a commission even where infants were interested, upon proper evidence of value (*e*).

Difficulty no
objection.

2. The inconvenience or difficulty in making a partition has been held to be no objection to a decree (*d*). The consequences of this, previous to the Partition Acts,

(*u*) *North v. Guinan*, Beat. 342.
(*x*) *Sparrow v. Friend*, 1 Dick.
348.

(*y*) *Johnstone v. Baber*, 6 De G.
M. & G. 439.

(*z*) See *infra*; *Young v. F.*, 13
Eq. 175, note.

(*a*) *Carteret v. Pettus*, 2 Ch. Ca.
214; 2 Swanst. 323, n.

(*b*) *Supra*, p. 16.

(*c*) *Brassey v. Chalmers*, 4 De G.
M. & G. 528.

(*d*) *Warner v. Baynes*, Amb. 589.

were often sufficiently absurd. In *Turner v. Morgan* (e) *Turner v. Morgan.* there was a decree for the partition of a single house. The commissioners allotted to the plaintiff the whole stack of chimneys, all the fireplaces, the only staircase, and all the conveniences in the yard. Exception was taken to this by the defendant, but Lord Eldon said he did not know how to make a better partition for them; the parties ought to agree to buy and sell. But it has never been deemed necessary that every house on an estate should be divided, if a sufficient part of the whole could be allotted to each; and in making a partition the Court would take the convenience of the parties into consideration (f). If the commissioners can find nothing to guide their discretion, they may cast lots; if they cannot agree, they may make separate returns, and the Court may deal with them as it may think advisable (f).

3. For the sake of convenience, in equity a recompense *Recompense.* has been made, either by a sum of money or rent for owelty, or equality of partition (g). This could not have been done under the writ at law. And the commissioners themselves, unless directed by a decree, have no power to award such sums to be paid; such power rests with the Court (h).

In making a decree for partition, the equitable rights of all the parties interested in the estate have been adjusted; for instance, effect has been given to an equitable lien on the premises for improvements; and where one of a number of joint owners has received more than his share of the rents of the estate, the Court has directed an account (i).

4. A partition never affects the rights of third parties, *Rights of third parties not affected.* such as commoners or mortgagees; and persons having such interests are therefore not necessary parties to the suit (k); and though it has been laid down that the legal

(e) 8 Ves. 143.

(h) *Mole v. Mansfield*, 15 Sim. 41.

(f) *Clarendon v. Hornby*, 1 P. Wms. 446; *Canning v. C.*, 2 Drew. 436.

(i) *Swan v. S.*, 8 Price, 518; *Story v. Johnson*, 2 Y. & C. Ex. 586; *Lorimer v. L.*, 5 Madd. 363.

(g) *Clarendon v. Hornby*, *sup.*

(k) *Swan v. S.*, *sup.*

title should be before the Court (*l*), this does not seem to have been insisted on; and now service of notice of a decree under s. 9 of the Partition Act, 1868 (*m*), will be sufficient to bind persons who formerly were made parties in the first instance.

Mutual conveyances.

5. After a partition in law no conveyances were requisite, as the rights of all parties were concluded by the judgment. But in equity, when the shares have been allotted to the parties, the partition is perfected by reciprocal conveyances; though in a case where the shares were minute and complicated, the Court, in order to save expense, instead of directing such conveyances, has declared each of the parties trustee as to the shares allotted to the others of them, and then vested the whole trust estate in a single new trustee under the Trustee Acts, with directions to convey to the several parties their allotted shares (*n*). Where infants were parties, the conveyances were respited until they came of age, and a day then given them to show cause against the decree; but now under the Trustee Act, 1850, ss. 7 and 30, the Court may declare the infant a trustee of the shares allotted in severalty to others (*o*).

IV. *The Partition Acts.*

Sale before the Acts.

Before the Partition Act, 1868, the Court had jurisdiction in a suit, even where infants were interested, if it appeared for their benefit, to direct a sale instead of a partition, if it was desired by the parties *sui juris* (*p*). So a sale was directed in a case in which a married woman was interested for her separate use without power of anticipation (*q*). But if one of several tenants in common

(*l*) *Miller v. Warmington*, 1 J. & W. 493.

(*m*) 31 & 32 Vict. c. 40.

(*n*) *Shepherd v. Churchill*, 25 Beav. 21.

(*o*) *Bowra v. Wright*, 4 De G. & Sm. 265.

(*p*) *Davis v. Turvey*, 32 Beav. 554.

(*q*) *Fleming v. Armstrong*, 34 Beav. 109.

refused to sell, he could, whatever the consequences to all parties, insist upon a partition (*r*).

The powers of Courts of equity in dealing with actions for partition have, however, been largely increased and improved by the operation of the Partition Acts, 1868 and 1876, which are now to be read as one.

1. By s. 3 of the Act of 1868 (*s*), it is enacted that “In a ^{31 & 32 Vict. c. 40, s. 3,} suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then, if it appears to the Court that by reason of the nature of the property to which the suit relates, or of the number of parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the Court may, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions.”

2. By s. 4: “In a suit for partition, where if this Act ^{and s. 4,} had not been passed a decree for partition might have been made, then if the party or parties interested individually or collectively to the extent of one moiety or upwards in the property to which the suit relates request the Court to direct a sale of the property and a distribution of the proceeds, instead of a division of the property between or among the parties interested, the Court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions.”

3. The distinction between these two sections requires compared. careful notice. The former gives power to the Court to

(*r*) *Griffies v. G.*, 11 W. R. 943.

(*s*) 31 & 32 Vict. c. 40.

direct a sale on the request of *any of the parties* interested, if, in the opinion of the Court, a sale would be more beneficial than a division of the property. The latter provides that if the parties interested *to the extent of a moiety or upwards* request a sale, the Court shall sell, unless it sees good reason to the contrary. Thus if the party or parties requesting a sale are interested in less than a moiety of the property, it is for them to prove to the Court that a partition cannot reasonably be made (*t*); and if they succeed in this the Court may so decree. This avoids the recurrence of any such difficulty as that in *Turner v. Morgan* (*u*). But if the party or parties praying a sale have a moiety or upwards of the interest, then the advantage of a sale is *prima facie* presumed, and the burden of proving that it is not advantageous is on those who oppose it (*x*).

In a case under s. 3 the Court only regards the question as to whether a sale would or would not be "more beneficial" for the parties interested in a pecuniary view, and it will not go into questions of sentiment (*y*). If the advantage of a sale is established, the Court is not restrained from granting it by the fact that only a small proportion of the parties interested request a sale (*z*).

Under this section, also, orders for sale have been made at the request of infants (*a*) and married women (*b*).

Under s. 4 it is imperative on the Court to order a sale, unless it sees good reason to the contrary. The mere fact that the owners of the other moiety oppose the sale is not a reason to the contrary (*c*), nor is the fact that the income of an infant defendant interested in a moiety might

(*t*) *Dyer v. Paynter*, 33 W. R. 806.

(*u*) *Supra*, p. 625.

(*x*) *Drinkwater v. Ratcliffe*, 20 Eq. 530; *Pemberton v. Barnes*, 6 Ch. 685; *Rowe v. Gray*, 5 Ch. D. 263.

(*y*) *Drinkwater v. Ratcliffe*, *sup.*

(*z*) *Pemberton v. Barnes*, *sup.*; *Allen v. A.*, 21 W. R. 842.

(*a*) *Young v. Y.*, 13 Eq. 175, n.; *France v. F.*, *ibid.* 173; *Grove v. Conyn*, 18 Eq. 387.

(*b*) *Davis v. Wiclisbach*, cited, 18 Eq. 388.

(*c*) *Pemberton v. Barnes*, 6 Ch. 685, 694; *Porter v. Lopes*, 7 Ch. D. 358.

be materially diminished by a sale (*d*), nor that the owner of one moiety is a yearly tenant of the whole property, and occupies it for commercial purposes and resides thereon (*e*). In a case in Ireland, it has indeed been laid down that the only good reason to the contrary is to show affirmatively that there is no difficulty in making an actual partition (*f*).

4. Section 5 enacts that "In a suit for partition, where s. 5,
 "if this Act had not been passed a decree for partition
 "might have been made, then if any party interested in
 "the property to which the suit relates requests the Court
 "to direct a sale of the property, and a distribution of the
 "proceeds, instead of a division of the property between or
 "among the parties interested, the Court may, if it thinks
 "fit, unless the other parties interested in the property, or
 "some of them, undertake to purchase the share of the
 "party requesting a sale, direct a sale of the property, and
 "give all necessary or proper consequential directions; and
 "in case of such undertaking being given, the Court may
 "order a valuation of the shares of the party requesting
 "a sale in such manner as the Court thinks fit, and may
 "give all necessary or proper consequential directions."

And by s. 6: "On any sale under this Act, the Court and s. 6,
 "may, if it thinks fit, allow any of the parties interested
 "in the property to bid at the sale on such terms as to non-
 "payment of deposit, or as to setting off or accounting for
 "the purchase-money, or any part thereof, instead of pay-
 "ing the same, or as to any other matters as to the Court
 "seem reasonable."

The construction to be put upon s. 5 was explained explained.
 by Sir G. Jessell, M.R., in *Drinkwater v. Ratcliffe* (*g*),
 where it is pronounced to apply to a case not coming
 under s. 4, inasmuch as a moiety do not apply for sale,

(*d*) *Rowe v. Gray*, *sup.*

(*e*) *Wilkinson v. Joberns*, 16 Eq.

(*f*) *In re Langdale's Estate*, 5 I.R.
 E. 572.

14.

(*g*) *Sup.*

nor under s. 3, inasmuch as the Court is here supposed to see no reason for preferring a sale to a partition; in other words, to a case where parties representing less than a moiety apply for a sale, but do not succeed in showing that it is more beneficial than partition. In such circumstances s. 5 confers a new power on any party to apply for a sale, and declares that he is entitled to it unless the other parties interested, or some of them, undertake to purchase the share of the party requesting a sale. In short, if one party, whatever his interest or reason, desires a sale, the parties objecting must, if the Court thinks fit, either withdraw their objections, or else be prepared to buy his share. But there is nothing to compel a man to sell his share, and it is open for a party requesting a sale, on an offer being made to purchase his interest, to withdraw his request (*i*). S. 5, in fact, gives an entirely new power to any party who is prepared to sell his own interest, to insist upon and obtain a decree of sale, unless some one is willing to buy his share, but does not give to the Court power to compel any party interested to sell his share at a valuation; and if the party rejects the offer of a valuation, he still has his common law right to a partition, and all rights conferred by the other sections of the Act, as far as he can bring himself within them (*k*).

Conduct of
sale.

As to s. 6, though as a general rule parties having the conduct of a sale are not allowed to bid, this has sometimes been allowed (*l*). The more proper course, however, would seem to be to give the conduct of the sale to some third person, if the parties desire liberty to bid (*m*). A sale out of Court will only be directed under strict conditions (*n*); and unless all the parties interested are *sui juris*, or there

(*i*) *Williams v. Games*, 10 Ch. 204.

(*k*) See *Pitt v. Jones*, 5 App. C. 651, reversing *Gilbert v. Smith*, 8 Ch. D. 548, 11 Ch. D. 78, where the whole of the vexed question is fully considered and authoritatively decided.

(*l*) *Pennington v. Dalbiac*, 18 W. R. 684.

(*m*) *Roughton v. Gibson*, 25 W. R. 269.

(*n*) *Pitt v. White*, 57 L. T. R. 650.

is a power of sale in a trust deed, the Court has no jurisdiction to order such a sale (o).

5. By ss. 7 and 8, s. 30 of the Trustee Act, 1850 (p), is decreed to extend and apply to cases where the Court directs sale instead of partition; and ss. 23, 24 and 25 of the Settled Estates Act, 1856 (q), to money received on such sale: the object of the first provision is to transfer the legal estate, by giving the Court the power to make a vesting order thereof (r). This power is of course usually resorted to where there are parties under disability; but it is not limited to such cases (s). The object of the second provision is to give power to direct the purchase-money to be paid to trustees, and applied by them as directed.

ss. 7 & 8.
Trustee Act,
s. 30.

Settled Es-
tates Act.

S. 9 was designed to avoid the difficulties which had previously often arisen from the non-joinder of all parties interested in the suit. But it was found ineffectual, and in consequence its amendment formed a conspicuous feature of the Act of 1876.

s. 9.

S. 10 provides that, "In a suit for partition the Court may make such order as it thinks just respecting costs up to the time of hearing."

s. 10.

6. The following doubts which had arisen under the administration of the Act of 1868 led to fresh legislation:—

Doubts arising
under the Act
of 1868.

It was questioned whether a decree could be made for sale of an estate if the bill contained no prayer for partition, unless it were added by amendment (t).

To meet this, s. 7 of 39 & 40 Vict. c. 17, enacted that an action for partition should include an action for sale and distribution of the proceeds, and that it should be sufficient to claim a sale, and not necessary to claim a partition.

39 & 40 Vict.
c. 17, s. 7.

It having been held that a married woman could not enter into an undertaking to purchase under s. 5 of the

(o) *Strugnell v. S.*, 27 Ch. D. 258.

(p) 13 & 14 Vict. c. 60.

(q) 19 & 20 Vict. c. 120; see now 40 & 41 Vict. c. 18, ss. 35—37.

(r) *Basnett v. Moron*, 20 Eq. 182.

(s) *Beckett v. Sutton*, 19 Ch. D. 646.

(t) *Teall v. Watts*, 11 Eq. 213.

s. 6.

Act of 1868 unless her husband joined therein, it was enacted by s. 6 of the Act of 1876 that in an action for partition a request for sale might be made on an undertaking to purchase given on the part of a married woman or other person under any disability by the next friend or other person authorised to act on behalf of such person; but that the Court should not be bound to comply with any such request or undertaking on the part of an infant unless it appeared that the sale or purchase would be for his benefit (*u*). Under this section a partition action may be brought by a person of unsound mind, not so found, by his next friend (*v*).

Notwithstanding s. 9 of the Act of 1868, considerable difficulty arose in cases where persons interested were out of the jurisdiction, it being held that no sale could be ordered unless every person interested in the property was either a party to the cause or had been served with notice of the decree (*x*). And where a decree for sale had been made in the absence of such parties, the Court refused to allow it to be acted upon until notice of the decree had been given them by advertisement (*y*). The Court also refused to decree a sale in the absence of a married woman whose share in the property was vested in trustees (*z*).

s. 3.

These decisions led to s. 3 of the Act of 1876, which gave the Court discretion to dispense with service on persons whom the Act of 1868 required to be served, where service was impracticable, or could only be effected at an expense disproportionate to the value of the property, and to direct advertisements to be published instead of such service; and it was provided that after the expiration of the time limited by the advertisement such persons should be bound by the proceedings in the action, and that the Court might then direct a sale.

(*u*) See *Grange v. White*, 18 Ch. D. 612; *Rimington v. Hartley*, 14 *ib.* 630.

(*v*) *Porter v. P.*, 37 Ch. D. 430.

(*x*) *Hurry v. H.*, 10 Eq. 316.

(*y*) *Peters v. Bacon*, 8 Eq. 125. See *Pragnell v. Batten*, 16 Ch. D. 360.

(*z*) *Dodds v. Gronow*, 20 L. T. 104.

Ss. 4 and 5 made provision for the payment into Court, ss. 4 & 5. further disposal, and ultimate distribution of the purchase-money, in cases in which service had been thus dispensed with.

V. Costs.

The rule laid down in *Agar v. Fairfax* (a) was that no costs would be given until the commission—that is to say, until the hearing—but that the subsequent costs of issuing, executing, and confirming the commission should be borne by the parties in proportion to the value of their respective interests, without any costs of the subsequent proceedings. It has been held that under the Partition Act, 1868, s. 10, the Court is not bound by the old rule, and may now exercise its discretion (b). Sometimes the old rule has been followed (c), but the general rule now is that the entire costs should be borne by the parties in proportion to their interests as declared by the decree (d). This is, however, subject to the discretion of the Court under the influence of special circumstances.

(a) 17 Ves. 533.

(b) *Simpson v. Ritchie*, 16 Eq.
103.

(c) *Wilkinson v. Joberns*, 16 Eq.

14.

(d) *Cannon v. Johnson*, 11 Eq. 90;
Ball v. Kemp-Welch, 14 Ch. D.
512; *Humphreys v. Jones*, 31 ib. 30.

SECTION II.—SETTLEMENT OF BOUNDARIES.

Wake v. Conyers.

- I. *Ownership of Soil must be in question.*
- II. *Proof of Defendant's Possession and Plaintiff's Title, and necessity of Equitable Relief.*
- III. *There must be Special Equitable Ground for Relief.*

We learn from the leading case of

WAKE v. CONYERS

[1 Eden, 331; 2 W. & T. L. C. 405]

some of the essential conditions which are required to create a jurisdiction as to the settlement of boundaries—conditions which are not rendered obsolete by the Judicature Act (*e*).

Soil must be
disputed.

I. There must be a *bonâ fide* dispute as to the ownership of the soil itself.

Thus the Court will not issue a commission to ascertain the boundaries of a parish in order to settle a dispute as to tithes (*f*) or rates (*g*). There being such dispute, relief has been granted where a part of the land in dispute belonged to a charity, and could not be ascertained without inquiry (*h*). The jurisdiction has been held to extend to the colonies (*i*); but in principle this seems doubtful (*j*).

Owner of rent
relieved.

An owner of a rent has been held entitled to equitable assistance, “on usage of payment,” where in consequence

(*e*) *Lascelles v. Butt*, 2 Ch. D. 588. (*h*) *Att.-Gen. v. Bowyer*, 5 Ves.
 (*f*) *Atkins v. Hatton*, 2 Anst. 300.
 386. (*i*) *Tulloch v. Hartley*, 1 Y. & C.
 (*g*) *St. Luke's v. St. Leonard's*, 1 Ch. 114.
 Bro. C. C. 40. (*j*) See *sup.* p. 17.

of the confusion of boundaries or otherwise, the particular lands on which the rent was charged could not be fixed upon (*k*). But the plaintiff must be able to fix upon some part of the land, and say that it is part of the land sought to be charged (*l*).

II. In order to claim relief, it is necessary for the plaintiff to show that some portion of the land the boundaries of which are alleged to be confused is in the possession of the defendant (*m*). He must also establish, by the admission of the defendant or by evidence, a clear title to some land in the defendant's possession (*n*). He must also show clearly that without the assistance of the Court the boundaries could not be found (*o*), or at least that, failing the assistance of equity, a multiplicity of legal actions would be occasioned (*p*).

Plaintiff must prove defendant's possession and his own title.

III. The jurisdiction as to the settlement of boundaries has been very jealously limited to cases in which some equity is superinduced by the act of the parties. It is important to inquire, therefore, what acts constitute a sufficient ground for the jurisdiction.

There must be equitable ground for relief.

If the confusion has been occasioned not by the negligence of both, but by the fraud of one of the parties, as by his ploughing or digging too near the other, with the intention of obliterating the boundaries, the Court has jurisdiction (*q*).

Fraud.

Where such a relation exists between two parties as that of tenant and landlord, which makes it the duty of the tenant to preserve the boundaries, if he permits them to be destroyed, so that the landlord's land cannot be distinguished from his, and specifically restored, he will be compelled, even in the absence of fraud on his part, to

Confusion caused by tenant.

(*k*) *D. of Leeds v. Powell*, 1 Ves. sr. 171.

My. 59; 2 *ib.* 630.

(*l*) *Mayor, &c. of Basingstoke v. Bolton*, 3 Drew. 50, 63.

(*o*) *Miller v. Warmingtton*, 1 J. & W. 491.

(*m*) *Att.-Gen. v. Stephens*, 6 De G. M. & G. 111, 149.

(*p*) *Bouverie v. Prentice*, 1 Bro. C. C. 200.

(*n*) *Godfrey v. Littell*, 1 Russ. &

(*q*) *Bute v. Glamorgan Canal Co.*, 1 Ph. 681.

substitute land of equal value ; and the land or its value may be ascertained by commission (*r*). And it seems that the same result would follow if the confusion was occasioned by a tenant for life (*s*). Where a confusion of lands was occasioned by a deviser, and they came into the hands of parties whose duty it was to ascertain the boundaries, a person entitled to part of such lands was allowed to come into equity to establish his claim (*t*).

Relief will be granted not only against a party guilty of such neglect or fraud, but also against all claiming under him, either as volunteers or purchasers with notice (*u*).

(*r*) *Att.-Gen. v. Fullerton*, 2 V. & B. 264; *Brown v. Wales*, 15 Eq. 142.

(*s*) *Att.-Gen. v. Stephens*, 6 De G. M. & G. 133.

(*t*) *Hicks v. Hastings*, 3 K. & J. 701.

(*u*) *Att.-Gen. v. Stephens*, *sup.*

CHAPTER VI.

SPECIFIC PERFORMANCE.

SECTION 1.—PRINCIPLES OF THE JURISDICTION.

I. *Generally.*II. *Grounds for refusing Relief.*1. *From the Nature of the Contract.*2. *From the Conduct of the Plaintiff.*III. *Statutory Modifications of the Jurisdiction.*

I. THE remedy for a breach of contract at common law is personal only; the sole redress which it affords to a disappointed party is damages. Consequently, as far as the common law remedy is concerned, it is open to a contracting party either to perform the contract or to pay damages, and to choose between these two courses at his pleasure. Equity, on the other hand, has regarded such a remedy as in many cases inadequate; and, deeming a contracting party bound in conscience to do exactly what he has agreed to do, has exercised its authority to compel the *Specific Performance* of such agreements.

General principles of the jurisdiction.

But it is not in every case that equity will thus interfere. The ground of its jurisdiction being the inadequacy of the remedy at law, it follows as a general principle that where damages at law will give a party the full compensation to which he is entitled, and will put him in a position as beneficial to him as if the agreement had been specifically performed, equity will not interfere.

Remedy at law must be inadequate.

Equity regards the substance, not the form.

The jurisdiction is not, however, dependent upon or affected by the form or character of the contract. It suffices that the transaction in substance amounts to and is intended to be a binding agreement for a specific object. Thus, if a bond with a penalty is made upon condition to convey certain lands upon the payment of a certain price, it will be deemed in equity an agreement to convey the land at all events, and not to be discharged by the purchaser's election to pay the penalty, although it has assumed the form of a condition only (*a*). It suffices that the primary object of the parties is the transfer of the property, and if that requires specific performance, the penalty will be regarded only as a security for its attainment (*b*).

The jurisdiction is discretionary.

Further, the exercise of the jurisdiction of equity to grant specific performance is always discretionary. The mere fact that the legal remedy is not adequate relief for the breach of a contract is not in itself sufficient to give to a plaintiff a claim as of right to the assistance of a Court of equity. The Court will always look at all the facts of the case, and will direct or refuse its action accordingly; and it may well be that something in the circumstances of the case, or in the position or conduct of the parties, will prevent the granting of the relief where the nature of the agreement would seem to afford good ground for seeking it.

General grounds of refusing specific performance.

II. Before proceeding, therefore, to particularly examine the operation of the doctrine of specific performance, it will be convenient to inquire what are the circumstances which will, on general grounds, induce equity to refuse its assistance. These circumstances relate either to the nature of the contract or to the conduct of the parties.

1. *From the nature of the contract.*

Agreement must be legal.

(1.) The agreement must be a legal one.

There is clearly no jurisdiction in equity to enforce an agreement which the law will not recognise at all. It is,

(*a*) *French v. Maccalle*, 2 Dr. & W. 269, 274; *sup.* p. 232.

(*b*) *Story*, 715.

as we shall see, often a ground for equitable relief that there is no remedy at law owing to the neglect of some formal provision, such as the writing or signature of a party, while nevertheless the circumstances are such as to render it inequitable for the party to avail himself of such a defence, and thus to refuse performance. But it is obvious that the neglect of such a legal provision cannot make a contract any better than it would have been if that provision had been complied with. Thus, though the Court will in some cases enforce parol arrangements in the nature of a trust, it cannot do so when the trust or understanding is designed to compass what is illegal—as, for instance, to hold land for the purposes of a charity in evasion of the Mortmain Act (*c*). Nor will it enforce an agreement which would result in the commission of a fraud, or which calls upon a man to do what he is not competent to do (*d*), still less an immoral agreement. Where a contract has been divisible, part being legal and part illegal, the legal part has been enforced (*e*). Specific performance has been refused when to enforce it would be to compel the defendant to commit a breach of a prior agreement with another person (*f*), and where performance would give rise to a fraud on the public (*g*).

(2.) On the same principle, an agreement without consideration cannot be enforced—as, for instance, where a person by voluntary settlement covenants to convey lands, and afterwards refuses to do so, or disposes of the lands otherwise by his will (*h*). Here, again, none of the circumstances which constitute a claim upon equity for assistance can make the agreement any stronger than it would have been at law.

On good consideration.

(3.) There must be a completed agreement, and the Complete,

(*c*) 9 Geo. 2, c. 36; *Stickland v. Aldridge*, 9 Ves. 516.

(*d*) *Harnett v. Yeilding*, 2 S. & L. 549.

(*e*) *Odessa, &c. Co. v. Mendel*, 8 Ch. D. 235.

(*f*) *Willmott v. Barber*, 15 Ch. D. 96.

(*g*) *Post v. Marsh*, 16 Ch. D. 395.

(*h*) *Jefferys v. J.*, Cr. & Ph. 138, 141.

and not
ambiguous.

terms of it must be certain and unambiguous (*i*). But in some cases where the evidence was in some respects contradictory, the Court has decreed performance, at the same time directing inquiries to ascertain the precise terms about which the parties differed (*k*); and it is not necessary to prove terms which are immaterial—*e.g.*, an agreement to do an act which has been already done, or which would be enforceable apart from such stipulation (*l*).

Reasonable,
and not pre-
judicial to
third persons.

(4.) Equity will not interfere to assist a contract which is unreasonable or prejudicial to third parties interested in the property (*m*), and though mere inadequacy of consideration is not of itself a sufficient ground for refusing specific performance (*n*), equity has refused to enforce where to do so would work great hardship on the defendant (*o*), or would cause a forfeiture (*p*), and also where there were depreciatory conditions in a sale by trustees (*q*); but in general if hardship is made a ground of defence, it ought to be proved that it existed at the date of the contract (*r*).

Not produc-
tive of future
litigation.

(5.) A contract will not be enforced when future litigation is likely to result from its performance—for instance, forcing a doubtful title, or even what is called “a good holding title” (*s*) upon a purchaser (*t*), or where there are other conflicting claims likely to harass the purchaser (*u*).

Possible of
performance.

(6.) Nor will specific performance be decreed of a contract which it is impossible to perform, or the material

(*i*) *Swaisland v. Dearsley*, 29 Beav. 430; *Tatham v. Platt*, 9 Ha. 660; *Taylor v. Portington*, 7 De G. M. & G. 328.

(*k*) *Mortimer v. Orchard*, 2 Ves. jr. 243; *Chattock v. Muller*, 8 Ch. D. 177.

(*l*) *Gregory v. Mighell*, 18 Ves. 328.

(*m*) *Thomas v. Dering*, 1 Keen, 729; *Beeston v. Stutely*, 6 W. R. 206.

(*n*) *Haywood v. Cope*, 25 Beav. 140; *Sullivan v. Jacob*, 1 Moll. 477.

(*o*) *Wedgwood v. Adams*, 6 Beav. 600; 8 Beav. 103; *Watson v. Marston*, 4 De G. M. & G. 230.

(*p*) *Peacock v. Penson*, 11 Beav. 355.

(*q*) *Dunn v. Flood*, 28 Ch. D. 586; 25 *ib.* 629.

(*r*) *Webb v. L. & P. R. Co.*, 9 Ha. 129.

(*s*) *Nottingham Brick Co. v. Butler*, 16 Q. B. D. 778.

(*t*) *Rogers v. Waterhouse*, 4 Drew. 329; *Parkin v. Thorold*, 16 Beav. 59, 67; *Lawrie v. Lees*, 7 App. C. 19; 14 Ch. D. 249.

(*u*) *Pegler v. White*, 33 Beav. 403.

terms of which the Court has it not in its power to enforce (*x*).

2. *As to the conduct of the parties.*

(1.) It is a general rule of equity that a *plaintiff must come with clean hands*. The Court will never countenance fraud. If, therefore, a plaintiff has been guilty of any wilful misrepresentation, or fraudulent suppression of the truth, or has put forth misleading particulars or conditions (*y*), he will get no relief (*z*). And if he has obtained the agreement by misrepresentation, he will not be able to get specific performance on waiving the part affected by the misrepresentation, and asking for performance *pro tanto*. Such conduct operates as a personal bar (*a*). But a mere indefinite misrepresentation, such as ought to put a person upon inquiry, will not so operate (*b*). So, also, though suppression of truth may be a bar (*c*), the mere suppression of acts having been done by the plaintiff, when the defendant must have known they were done by somebody, is not sufficient (*d*). So if the plaintiff has induced the defendant to take too much drink, and then taken advantage of him, not only would specific performance be refused, but the contract would be rescinded (*e*); and if, though the plaintiff were innocent of inducing the defendant to drink, he was so intoxicated as to be incapable of exercising sound judgment, that would alone prevent a decree for specific performance (*f*). Reference may be made to the chapter on Fraud for a fuller analysis of contracts viewed with disfavour in equity on such grounds as are here mentioned. If a contract is such that equity

The plaintiff must come with clean hands,

(*x*) *Green v. Smith*, 1 Atk. 572, 573; *Waring v. M. S. & L. R. Co.*, 7 Ha. 483, 492; *Hipgrove v. Case*, 28 Ch. D. 356.

(*y*) *Brewer v. Brown*, 28 Ch. D. 309.

(*z*) *Drysdale v. Mace*, 5 De G. M. & G. 103; *Falcke v. Gray*, 4 Drew. 651; *Playford v. P.*, 4 Ha. 546.

(*a*) *Clermont v. Tasburgh*, 1 J. & W. 112,

(*b*) *Fenton v. Browne*, 14 Ves. 141; *Attwood v. Small*, 6 C. & F. 232.

(*c*) *Shirley v. Stratton*, 1 Bro. C. C. 440.

(*d*) *Haywood v. Cope*, *sup.*

(*e*) *Cooke v. Clayworth*, 18 Ves. 12.

(*f*) *Cragg v. Holme*, cited 18 Ves. 14; but see *Lightfoot v. Heron*, 3 Y. & C. Ex. 586.

will rescind it as fraudulent, *à fortiori*, it will refuse specific performance.

and promptly. (2.) *Vigilantibus non dormientibus æquitas subvenit.*

A plaintiff must come within a reasonable time with his demand. *Laches* will disentitle him to assistance (*g*). Especially is this the case when the subject-matter of the contract is an article of fluctuating value; so that delay may greatly change the aspect of the bargain (*h*).

Statutory
modifications
of the juris-
diction.

III. It will be convenient also here to call attention to certain statutes which have affected the jurisdiction in these matters, particularly the Chancery Amendment Act, 21 & 22 Vict. c. 27, commonly known as Lord Cairns' Act.

Cairns' Act,
21 & 22 Vict.
c. 27.

(1.) By 21 & 22 Vict. c. 27, which took effect from and after the 1st of November, 1858, it is enacted that in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct. It also provides means for the assessment of damages and the trial of questions of fact either by a jury before the Court itself or by the Court alone, or for the assessment of damages by a jury before any judge of one of the Superior Courts of Common Law at *nisi prius*, or before the sheriff of any county or city.

With reference to the construction and application of this Act, the following points seem to be settled:—

Effects of this
Act.

(i.) That the statute does not extend the jurisdiction of the Court to cases where there is a plain common law

(*g*) *Moore v. Blake*, 1 Ball & B. & G. 674, 691.

62; *Smith v. Clay*, 3 Bro. C. C. (*h*) *Pollard v. Clayton*, 4 K. & J. 462.

640; *Eads v. Williams*, 4 De G. M.

remedy, and where before the statute it would not have interfered (*i*). In other words, the Court could not under the Act award damages save in cases where it had jurisdiction to decree specific performance. It could give damages in lieu of, or in addition to, specific performance; but this ability brought no new matter within the principle of specific performance (*k*).

(ii.) Where, however, the Court has jurisdiction to grant specific performance, it may award damages for non-performance of part of the contract, in respect of which part it could not have enforced specific performance. For example, though, as we shall see, there is no jurisdiction to decree specific performance of a contract to build a house, the remedy at law being complete, yet if a plaintiff asks for specific enforcement of an agreement whereby he undertook to grant and the defendant to take a lease as soon as the defendant should have built a new house on the land, the plaintiff may be awarded damages for the non-building of the house at the same time that he obtains a decree for specific performance of the agreement to accept a lease (*l*).

(iii.) A plaintiff will not be entitled to damages if he has done any act which would disentitle him to specific performance (*m*).

(iv.) Though, as a general rule, damages will be awarded only as incidental to granting specific performance or an injunction, yet damages may be given where the evidence is insufficient to procure a mandatory injunction (*n*).

(v.) The power to give damages being discretionary, the Court may refuse to give damages where the question of damages can be more satisfactorily tried at law (*o*).

(i) *Wicks v. Hunt*, Johns. 372, 380.

(k) *Rogers v. Challis*, 27 Beav. 175; *Lewers v. Shaftesbury*, 2 Eq. 270.

(l) *Soames v. Edge*, Johns. 669; *Wilkinson v. Clements*, 8 Ch. 96.

(m) *Collins v. Stuteley*, 7 W. R. 710.

(n) *City of London Brewery v. Tennant*, 9 Ch. 212; *Holland v. Worley*, 26 Ch. D. 578.

(o) *Durell v. Pritchard*, 1 Ch. 244.

Lord Cairns' Act has been repealed by 44 & 45 Vict. c. 59, but without prejudice to any jurisdiction or principle or rule of law or equity established or confirmed by it. The above authorities accordingly remain applicable.

Rolt's Act,
25 & 26 Vict.
c. 42.

(2.) By 25 & 26 Vict. c. 42, the Court of Chancery may, in its discretion, direct an issue to be tried at the assizes or at *nisi prius*, where the circumstances render such a course advisable.

Judicature
Act, 1873.

(3.) By the Judicature Act, 1873 (*p*), s. 34, all causes and matters for the specific performance of contracts between vendors and purchasers of real estates, including contracts for leases, are assigned to the Chancery Division of the High Court of Justice.

Having regard to these preliminary matters, we proceed to consider the general operation of the doctrine of specific performance, illustrated by the leading decisions on the subject.

(*p*) 36 & 37 Vict. c. 66.

SECTION II.—TO WHAT CONTRACTS THE REMEDY IS APPLIED.

I. *Contracts relating to Land.*

II. *Contracts relating to Personal Chattels.*

Cuddee v. Rutter.

1. *General Rule.*

2. *Special Circumstances giving Jurisdiction.*

Pusey v. Pusey.

Somerset v. Cookson.

III. *Contracts respecting Personal Acts.*

I. *Contracts relating to Land.*

1. It has been said that where a contract in writing respecting real property, in conformity with the Statute of Frauds, is entered into between competent parties, and is, moreover, in its nature and circumstances unobjectionable, it is as much of course for a Court of equity to decree specific performance, as it is for a Court of common law to give damages for the breach of such a contract (*q*), and the fact that the lands in question are situate out of the jurisdiction is no bar to the remedy (*r*).

General rule in favour of specific performance.

2. We elsewhere fully discuss the action of the Courts of equity in those cases in which the Statute of Frauds has not been complied with, but in which it is nevertheless deemed equitable to assist the plaintiff; and under this head it therefore now only remains to call attention to certain special circumstances under which the jurisdiction has been appealed to.

Defence of Statute of Frauds, *infra*, p. 657.

(*q*) *Hall v. Warren*, 9 Ves. 605, 608.

(*r*) *Penn v. Baltimore*, *sup.* p. 16.

Contracts to
take lands
under statu-
tory powers.

3. Considerable discussion has taken place respecting contracts by railway companies to take lands under the statutory powers conferred upon them; and it is settled that such companies are equally with private individuals amenable to the enforcement of specific performance at the suit of the vendor. This has been put upon the basis of mutuality of remedy: the company being able to compel the transfer, the vendor has on his side a right to insist on the specific performance of the contract (*s*). Where also a railway company has given notice to treat for land, and the price has been fixed by the landowner and the company, or by arbitrators under the Lands Clauses Consolidation Act, the railway company is treated as an ordinary purchaser, and will be compelled in equity to complete the purchase (*t*). So, also, if after notice to treat the company has paid the purchase-money for leaseholds, and has with the consent of the lessee been admitted into possession, it will at the suit of the lessee be compelled to accept an assignment with the usual covenants (*t*).

Effect of
notice to
treat.

Agreements
for leases and
mortgages.

4. Agreements to grant leases or mortgages in consideration of money due are frequently the grounds of suits for specific performance (*x*). But equity will not enforce the granting of a lease, when the lease, if granted, might be determined at once for a breach of a covenant which the plaintiff has already broken (*y*). And it has refused to enforce an agreement for a yearly tenancy, on the ground of the adequacy of the legal remedy (*z*).

(*s*) *Doherty v. Waterford and Limerick Railway*, 13 Ir. Eq. 538. 18; *Nicholson v. Smith*, 22 Ch. D. 640.

(*t*) *Harvey v. Met. R. Co.*, 7 Ch. 154. (*y*) *Jones v. J.*, 12 Ves. 186, 188.

(*z*) *Clayton v. Illingworth*, 10 Ha. 451.

(*x*) *Hermann v. Hodges*, 16 Eq.

II. *Contracts relating to Personal Chattels.*

1. These are distinguishable from contracts relating to land, not by any difference in the principle on which they are treated, but because from their nature a breach thereof has usually a complete remedy at law.

General distinction from contracts respecting land.

The leading authority respecting this part of the subject is

CUDDEE v. RUTTER.

[5 Vin. Ab. 538, pl. 21; 1 W. & T. L. C. 848.]

This was a bill to transfer £1,000 South Sea Stock which the defendant had agreed to transfer at the rate of 104 per cent. Before the time specified for the delivery the stock rose largely in value; the defendant did not deliver the stock, but offered to pay the difference, and so submitted by his answer. Lord Chancellor Parker dismissed the bill on the ground that one £1,000 stock was as good as another, which the plaintiff might have bought of any person on the same day. If the plaintiff, therefore, had accepted payment of the difference from the defendant, he would not have suffered at all by the fact that the agreement was not specifically performed. The case was very different from that of lands of which one parcel could rarely be substituted for another with the same convenience to the purchaser, though it might be of the same market value.

2. The legal remedy therefore being adequate, there is generally no ground for the exceptional and discretionary interference of equity in contracts respecting personal chattels. Special circumstances may, however, induce the Court to decree specific performance of such contracts; and these may be classed under three heads; firstly, where there is some peculiar difficulty in applying the legal remedy; secondly, where there is some peculiarity in the position of the parties, which gives a special claim for equitable assistance; thirdly, where the jurisdiction arises from the peculiarity of the subject-matter of the contract.

Specific performance only granted in special circumstances.

(1.) Where there is difficulty in applying the legal remedy. *E.g.* in estimating the damages.

(1.) In the following cases, the difficulty of applying the legal remedy was held to give jurisdiction to equity to insist on specific performance.

In *Taylor v. Neville* (a) specific performance was decreed of a contract for sale of 800 tons of iron to be delivered and paid for in a certain number of years, and by instalments; Lord Hardwicke stating as the reason of his decision that as the profit upon the contract depended upon future events, it could not be correctly estimated in damages, but a calculation thereof could only proceed upon conjecture.

For a similar reason, specific performance was decreed of a contract to pay the plaintiff a certain annual sum for his life, and also a certain other sum for every hundredweight of brass wire manufactured by him during his life at certain mills (b).

In *Buxton v. Lister* (c) Lord Hardwicke puts the case of a ship's carpenter purchasing timber which was peculiarly convenient to him by reason of its vicinity, and also the case of an owner of land covered with timber contracting to sell the timber in order to clear the land, and assumes that, as damages would not be a complete remedy, specific performance of such contracts would be decreed.

In *Adderley v. Dixon* (d) specific performance was, at the suit of the vendor, decreed of an agreement to purchase certain debts which had been proved under two commissions of bankruptcy, on the ground that damages at law could not accurately represent the value of the future dividends, and could only be conjectural.

Similar principles have led to the enforcement of contracts for the purchase of annuities (e), and of a patent (f).

(a) Cited in *Buxton v. Lister*, 3 Atk. 384.

(b) *Ball v. Coggs*, 1 Bro. P. C. 140.

(c) *Sup.*

(d) 1 S. & S. 607.

(e) *Clifford v. Turrell*, 1 Y. & C. C. 138; *Kenny v. Wexham*, 6 Madd. 355.

(f) *Cogent v. Gibson*, 33 Beav. 557.

(2.) Jurisdiction is sometimes founded on some special relation between the parties.

(2.) Special relation between the parties. Remedy must be mutual.

(i.) Thus, on the ground that the remedy ought to be mutual, a plaintiff is sometimes assisted, when it might have been thought that damages would have completely compensated him. This argument was used in *Adderley v. Dixon* (g) above quoted, and also in the cases respecting annuities, where the vendor was assisted, though his demand was only for a money payment. The same principle was relied on in the suits against railway companies for the completion of purchases of land, already discussed. And it seems established that where one party to a contract has a right to ask for specific performance, the other party will also be entitled to similar assistance, notwithstanding that a simple money payment would seem to indemnify him.

(ii.) Again, if a trust be created, the circumstance that the subject-matter of the trust is a personal chattel will not prevent the Court from enforcing due execution of the trust, whether against the trustees or persons obtaining possession of the property with notice (h).

Trusts.

(iii.) The relation of principal and agent and other similar relations have also been held to be sufficient to move a Court of equity where it would otherwise have left the parties to law. Where a fiduciary relation subsists between the parties, whether it be the case of an agent, or a trustee or a broker, or whether the subject-matter be stock or cargoes or chattels of whatever description, the Court will interfere to prevent a sale, either by the party entrusted with the goods, or by a person claiming under him (i).

Principal and agent.

(3.) The cases most frequently referred to as illustrating the interference of equity in a transaction respecting

(3.) Peculiarity of the subject-matter.

(g) *Sup.*

(h) *Pooley v. Budd*, 14 Beav. 34, 43, 44; *Stanton v. Percival*, 5 H. L.

257.

(i) *Wood v. Rowcliffe*, 2 Ph. 382.

chattels on the ground of the peculiarity of the subject-matter of the contract are

PUSEY v. PUSEY

[1 Vern. 273; 1 W. & T. L. C. 890],

and

SOMERSET v. COOKSON

[3 P. Wms. 389; 1 W. & T. L. C. 891].

In the former of these cases the unique Pusey horn was ordered to be specifically delivered up to the plaintiff, and in the latter a curious Greek altar piece. It is clear that it would be a most insufficient remedy to decree payment of the intrinsic value of such articles as these, which could not at any price be replaced.

Heirlooms,
&c.

(i.) These cases are typical of one division of this class. Heirlooms, and chattels of unique character, may evidently be said to partake of the quality of land in that they may be of much greater value to one person than to another. Their value to a given person is not estimable in damages (*l*). Within the same principle have been included pictures and other works of art (*m*). But where by the terms of the agreement and the frame of the pleadings, the plaintiff, seeking restitution of a picture had in effect put a fixed price upon it, it was held that damages would be an adequate remedy, and equity refused to interfere (*n*).

Deeds and
writings.

(ii.) On the same principle, the Court will order the delivery up of specific deeds and writings to the persons legally entitled thereto (*n*).

In suits of this nature it is not necessary in equity, as it was in law, to prove conversion or resistance to deliver them up when sought to be recovered (*o*).

Sale of shares
in companies.

(iii.) More numerous are the cases which have arisen out of contracts for the sale of shares in railways and joint

(*l*) *Fells v. Read*, 3 Ves. 70.

(*m*) *Falcke v. Gray*, 4 Drew. 651, 658; *Dowling v. Bejemann*, 2 J. & H. 544.

(*n*) *Brown v. B.*, 1 Dick. 62;

Jackson v. Butler, 2 Atk. 306; *Reese v. Trye*, 1 De G. & Sm. 273; *Gibson v. Ingo*, 6 Hare, 112.

(*o*) *Turner v. Letts*, 20 Beav. 185, 191.

stock companies. In *Duncuft v. Albrecht* (*p*) a distinction was drawn between railway shares and public stock, the former being limited in number, and not always obtainable (*g*). Shares in a joint stock company have been similarly dealt with (*r*); and it was considered no bar to the jurisdiction that by the deed of settlement shareholders could only transfer their shares in such a manner as the directors should approve. On the other hand, specific performance has been refused where the directors' assent, which was necessary in order to place the purchaser's name on the register, has been refused (*s*), though if the directors wantonly or unreasonably refused to admit a purchaser, the Court might compel them to do so, and enforce specific performance of the contract (*t*).

An agreement to accept a transfer of railway shares on which nothing has been paid may be enforced, as an agreement for valuable consideration, in consequence of the liabilities to which the purchaser is subjected, and from which the vendor is relieved upon the transfer (*u*). And where specific performance has been decreed of a contract to purchase railway shares, the Court will order the purchaser to pay any calls that have been made since the sale, to indemnify the vendor against all future calls in respect of the shares, and to take proper measures to procure himself to be registered (*x*).

An agreement to accept shares in a joint stock company will be specifically enforced in equity, if the directors are prompt in instituting proceedings for that purpose (*y*); and in the absence of deception it is no objection that a call has been made on the shareholders, of which the purchaser

Agreements
to accept
shares.

(*p*) 12 Sim. 189.

(*q*) *Shaw v. Fisher*, 2 De G. & Sm. 11.

(*r*) *Poole v. Middleton*, 29 Beav. 646.

(*s*) *Birmingham v. Sheridan*, 33 Beav. 660.

(*t*) *Ib.* 665; *Robinson v. The*

Chartered Bank, 1 Eq. 32.

(*u*) *Cheale v. Kenward*, 3 De G. & J. 27.

(*x*) *Wynne v. Price*, 3 De G. & Sm. 310.

(*y*) *New Brunswick, &c. Co. v. Muggeridge*, 4 Drew. 686; *Oriental, &c. Co. v. Briggs*, 2 J. & H. 625.

had no notice (*z*). *Secus* if the purchase was made, or even the money paid and a transfer executed in ignorance that a winding-up petition had been presented (*a*).

Ships.

(iv.) The Acts for the regulation of British shipping (*b*) have modified the action of equity as to the contracts respecting British ships. As, under the operation of the Acts, there can be no transfer in equity which is not a transfer at law, equity will not enforce a contract for the purchase of a British ship or of shares therein (*c*). The Court has jurisdiction to compel a foreigner to specifically perform a contract for sale of a foreign ship (*d*).

Goodwill of business.

(v.) Where the goodwill of a business is altogether or principally annexed to the premises on which it is carried on, a contract for the sale of the goodwill and premises may be enforced in equity (*e*); but the Court will not decree specific performance of a contract for the sale of the goodwill of a business unconnected with the premises (*f*).

Sales at a valuation.

(vi.) We may here conveniently treat of contracts for sale at a price to be determined by arbitration or valuation. In these cases, unless the price be fixed in the manner determined upon so as to be made part of the agreement, specific performance will not usually be decreed (*g*). But if the vendor refuses to allow a valuer to enter to make a valuation, the Court will make a mandatory order to compel the vendor to allow him to enter, and to enable the valuation to proceed (*h*). And where the fixing of the value by arbitrators is not of the essence of the agreement, the Court will carry the agreement into effect, and will itself, if necessary, ascertain the value (*i*).

(*z*) *Hawkins v. Maltby*, 3 Ch. 188; 4 Ch. 200, 202.

(*a*) *Emmerson's Case*, 1 Ch. 433.

(*b*) 8 & 9 Vict. c. 89; 17 & 18 Vict. c. 104.

(*c*) *Hughes v. Morris*, 2 De G. M. & G. 349.

(*d*) *Hart v. Herwig*, 8 Ch. 860.

(*e*) *Cruttwell v. Lye*, 17 Ves. 335.

(*f*) *Baxter v. Conolly*, 1 J. & W. 573.

(*g*) *Milnes v. Gery*, 14 Ves. 400;

Richardson v. Smith, 5 Ch. 648.

(*h*) *Smith v. Peters*, 20 Eq. 511.

(*i*) *Dinham v. Bradford*, 5 Ch. 519.

III. *Contracts relating to Personal Acts.*

1. Of these we will consider first, as being of a somewhat special nature, contracts to perform certain acts relating to land, such as contracts to build or repair. Acts relating to land.

As a general rule, such contracts will not be specifically enforced (*k*). In the first place, the legal remedy is usually sufficient; secondly, it would be almost impossible for the Court to carry out its decree if made (*l*). Where the agreement to build or repair is incidental to a contract of which the specific performance would be ordinarily decreed, such as a contract to grant a lease, the Court will decree specific performance as regards the lease, and at the same time, if necessary, direct an inquiry as to damages under Lord Cairns' Act, as above described (*m*). Contracts to build or repair not generally enforced.

Nevertheless, the Court has jurisdiction to decree performance of certain works, where damages would not be an adequate remedy. Thus, a railway company has been decreed to construct and maintain an archway under an embankment which traversed the plaintiff's property (*n*). In this and other similar cases, one motive which induces equity to relieve is the inability of the plaintiff to enter on the land to do the work at his own cost, and so to ascertain the damages sustained by non-performance (*o*). Again, where there have been acts amounting to part performance of the contract, the Court will decree specific performance which it might otherwise have refused (*p*). Exceptions.

The general tendency of modern decisions is towards granting the relief thus sought if possible (*q*). Hence it has been held no defence to an action against a railway company that specific performance would occasion great Modern tendency in favour of granting relief.

(*k*) *Errington v. Aynsley*, 2 Bro. C. C. 341.

(*l*) *Brace v. Wehnert*, 25 Beav. 348; *S. W. R. Co. v. Wythes*, 1 K. & J. 186.

(*m*) *Middleton v. Greenwood*, 2 De G. J. & S. 142.

(*n*) *Storer v. G. W. R. Co.*, 2 Y. & C. C. 48.

(*o*) *South Wales R. Co. v. Wythes*, 1 K. & J. 186, 200.

(*p*) *Price v. Corp. of Penzance*, 4 Ha. 506, 509.

(*q*) *Wilson v. Furness R. Co.*, 9 Eq. 28, 33.

inconvenience to the public (*r*), or that the contract was *ultra vires*, or that the Attorney-General was a necessary party, as representative of the public (*s*).

As to partnership.

2. Passing now from contracts for works on land, we note that Courts of equity will not, as a rule, decree specific performance of an agreement to enter into and carry on a partnership (*t*). This rule has been sometimes departed from; for instance, where the agreement was for a partnership for a fixed and definite time, and there had been a part performance (*u*); but to warrant it the circumstances must be strong (*x*).

Hiring and service.

3. Again, as contracts of hiring and service are of a confidential character, and cannot, therefore, advantageously be enforced against an unwilling party, equity now refuses to decree specific performance of them (*y*). The same remark applies to the contract of agency (*z*).

Separation of husband and wife.

4. On special grounds, agreements for separation of husband and wife, with the execution of the necessary deeds, will be enforced, provided there be a good consideration to support the contract; as, for instance, a compromise of a divorce suit (*a*), a covenant by trustees to indemnify the husband against the wife's debts (*b*), or the wife's acceptance of maintenance from her husband instead of proceeding against him for divorce (*c*).

Agreements to refer to arbitration.

5. It was not the practice for Courts of equity to decree the specific performance of a covenant to refer disputes to arbitration (*d*), unless the agreement to submit contained a covenant not to take proceedings at law or in equity. But now, where there is in a contract an agreement to refer

(*r*) *Raphael v. T. V. R. Co.*, 2 Ch. 147.

(*s*) *Wilson v. Furness R. Co.*, 9 Eq. 28.

(*t*) *Scott v. Rayment*, 7 Eq. 112.

(*u*) *Anon.*, 2 Ves. sen. 629; *England v. Curling*, 8 Beav. 129.

(*x*) *Downs v. Collins*, 6 Ha. 418, 437; *Lindley*, 914.

(*y*) *Johnson v. S. & B. R. Co.*, 3 De G. M. & G. 914.

(*z*) *Chinnock v. Sainsbury*, 30 L. J. N. S. Ch. 409.

(*a*) *Hart v. H.*, 18 Ch. D. 670; *Besant v. Wood*, 12 ib. 605.

(*b*) *Gibbs v. Harding*, 5 Ch. 336; *Wilson v. W.*, 1 H. L. 538; 5 H. L. 40.

(*c*) *Hobbs v. Hull*, 1 Cox, 445.

(*d*) *Street v. Digby*, 6 Ves. 815; *Cooke v. C.*, 4 Eq. 77; *Halfhide v. Fenning*, 2 Bro. C. C. 336.

matters in dispute to arbitration under the Common Law Procedure Act (*e*), the Court is strongly disposed to enforce such agreements, by ordering a stay of proceedings in the action (*f*). But where fraud is charged, and a *prima facie* case disclosed, the Court will usually refuse to stay proceedings (*g*). In any case the Court retains jurisdiction to vary or discharge the order on good cause shown, or an objection may be raised in an action on the award (*h*). Cases arising under the arbitration clauses in Building Societies Acts rest on quite other grounds (*i*).

The Court will decree specific performance of an award, Awards. where it is to do anything *in specie*, as to convey an estate or assign securities (*j*); but not, it seems, an award to pay money (*k*). In short, the award is treated as an agreement between the parties, and will be enforced where an agreement would be enforced, not otherwise (*l*).

6. A Court of equity will not specifically enforce a con- Borrowing and lending. tract to lend (*m*), nor a contract to borrow (*n*), or to pay money (*o*); but it will always decree specific performance Agreement for mortgage. of an agreement to execute a mortgage in consideration of money due (*p*), or an agreement by parol to execute a bill of sale of personal chattels to secure the plaintiff against certain liabilities (*q*).

7. Where a person has entered into a contract not to do Negative contracts, how enforced. a thing, specific performance of such a negative contract takes the form of an injunction. Thus, the ringing of a

(*e*) 17 & 18 Vict. c. 125.

(*f*) *Seligmann v. De Boutillier*, 1 L. R. C. P. 681; *Willesford v. Watson*, 14 Eq. 572.

(*g*) *Russell v. R.*, 14 Ch. D. 471.

(*h*) *Brierley Hill Local Board v. Pearsall*, 9 App. C. 595.

(*i*) See *Hack v. Lond. Provident, &c. Soc.*, 23 Ch. D. 103; *Municipal, &c. Soc. v. Kent*, 9 App. C. 260.

(*j*) *Norton v. Mascall*, 2 Vern. 24.

(*k*) *Hall v. Hardy*, 3 P. Wms. 190.

(*l*) *Blackett v. Bates*, 1 Ch. 117.

(*m*) *Sichel v. Mosenthal*, 30 Beav. 371.

(*n*) *Rogers v. Challis*, 27 Beav. 175.

(*o*) *Crampton v. The Varna R. Co.*, 7 Ch. 562.

(*p*) *Ashton v. Corrigan*, 13 Eq. 76.

(*q*) *Taylor v. Eckersley*, 2 Ch. D. 302; 5 Ch. D. 740.

bell (*r*), carrying on a trade (*s*), acting on the stage (*t*), erecting buildings (*u*), making applications to Parliament (*x*), and various other acts have been restrained, where they have been contrary to agreement. But the Court will not compel by injunction the doing of something which involves continuous employment for an indefinite period (*y*). It will not usually restrain the doing of an act which is merely ancillary to an agreement of which it cannot compel specific performance (*z*): but in a recent case, where a contract for a sale of chattels contained an express negative stipulation that the vendor would not sell to any other person than the purchaser, the Court restrained the vendor from so selling, although the contract was one of which specific performance would not have been decreed (*a*).

(*r*) *Martin v. Nutkin*, 2 P. Wms. 266.

(*s*) *Barret v. Blagrove*, 5 Ves. 555.

(*t*) *Lumley v. Wagner*, 1 De G. M. & G. 604.

(*u*) *Rankin v. Huskisson*, 4 Sim. 13.

(*x*) *Ware v. Grand Junction Co.*, 2 Russ. & My. 470; *Exp. Hart-ridge*, 5 Ch. 671.

(*y*) *Powell, &c. Co. v. Taff R. Co.*, 9 Ch. 331.

(*z*) *Merchants' Co. v. Banner*, 12 Eq. 18.

(*a*) *Donnell v. Bennett*, 22 Ch. D. 835; *Lybbe v. Hart*, 29 Ch. D. 8.

SECTION III.—DEFENCE OF THE STATUTE OF FRAUDS.

I. *Part Performance.*Lester *v.* Foxcroft.II. *Other Grounds for Relief.*III. *Evidence as to Parol Variations.*Townshend *v.* Stangroom.

In discussing in the last section the general principles by which equity was guided in dealing with claims for specific performance, we postponed for separate examination that extensive class of cases arising from contracts respecting land in which a non-compliance with the Statute of Frauds is set up as an objection to the interference of equity. To this we now revert.

The Statute of Frauds (*a*) enacts that “no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.” Notwithstanding this enactment, there are many cases in which, though the Courts of Common Law would not have assisted the plaintiff, equity has interfered out of its regard for considerations which the common law refused to recognize. This has been especially the case where the party seeking relief has been put into a situation which makes it against conscience in the other party to insist on

Statute of
Frauds,
29 Car. II.
c. 3, s. 4.

(*a*) 29 Car. II. c. 3, s. 4.

Statute may
not be used as
an instrument
of fraud.

the want of writing signed according to the statute, as a bar to the relief. The principle on which these cases rest is that even an Act of Parliament shall not be used as an instrument of fraud. The Court does not, indeed, affect to set aside the Act of Parliament, but it fastens on the individual who seeks against conscience to avail himself of it, and imposes on him a personal obligation.

Before proceeding to consider the circumstances in which it has been deemed inequitable to permit the statute to be pleaded in defence, it is desirable briefly to review a number of cases which turn upon the interpretation of the statute itself, and in which there has been much discussion as to what terms need to be expressed in the memorandum which the statute requires, or otherwise what documents will suffice to constitute such a memorandum.

A formal contract in terms is not necessary, provided that there is evidence of a completed agreement between the parties, a definite proposal on the one side, and a plain unconditional acceptance on the other.

Contract ex-
pressed in
correspond-
ence.

Thus the statute will be satisfied with a contract deduced from correspondence between the parties, and this notwithstanding that the same discloses that the agreed terms were intended to be embodied in a formal instrument (*b*). But in judging as to the existence of a completed contract under such circumstances, the whole of the correspondence must be considered. You may not draw the line at one point in the negotiation at which the *consensus* appears to be complete, and disregard conditional terms introduced at a later time (*c*). Two or more documents may be read together for the purpose of deducing a contract, although they do not refer to one another, if it appears that they refer to the same parol agreement (*d*).

Contents of

There must of course be an identification on the memo-

(*b*) *Rossiter v. Miller*, 3 App. C. 311; *Jervis v. Berridge*, 8 Ch. 1124; 5 Ch. D. 648; *Bonnewell v. Jenkins*, 8 Ch. D. 70.

(*d*) *Studds v. Watson*, 28 Ch. D. 305.

(*c*) *Hussey v. Horne-Payne*, 4 App.

random of the property affected, though a particular description is not required, and the memorandum for this purpose is read with due regard to the circumstances of the sale (*e*). Similarly, the parties must be identified, though not mentioned by name (*f*), and the time at which the purchase is to be completed must be determined (*g*). The appearance of any condition in the acceptance suspends its operation as a contract until it is assented to (*h*). For a complete exposition of the law as to the general essentials of the formation of a contract, reference may be made to Pollock on Contracts, pp. 1—48, 4th ed.

the memorandum.

I. *Part Performance.*

The majority of the cases, in which relief is granted on the grounds above mentioned, are deemed to be taken out of the statute by the fact that the agreement on which they rest has been in part performed by the plaintiff. Among them a leading authority is

Ground of interference.
1. Part performance.

LESTER v. FOXCROFT

[1 Colles. P. C. 108 ; 1 W. & T. L. C. 828],

in which specific performance of a verbal agreement to grant a lease was decreed, notwithstanding the Statute of Frauds, on the ground that in reliance thereon the lessee had incurred considerable expense and trouble in pulling down an old house and building new ones according to the terms of the agreement, it being considered against conscience under such circumstances for the defendant to plead the statute.

The inquiry is thus suggested as to what circumstances

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| (<i>e</i>) <i>Shardlow v. Cotterill</i> , 20 Ch. D. 90 ; 18 <i>ib.</i> 280 ; <i>Chattock v. Muller</i> , 8 <i>ib.</i> 177. | (<i>g</i>) <i>May v. Thompson</i> , 20 Ch. D. 705. |
| (<i>f</i>) <i>Rossiter v. Miller</i> , <i>sup.</i> ; <i>Potter v. Duffield</i> , 18 Eq. 4. | (<i>h</i>) <i>Williams v. Brisco</i> , 22 Ch. D. 441 ; <i>Hussey v. Horne-Payne</i> , <i>sup.</i> |

are considered by equity sufficient to render it against conscience to allow the Statute of Frauds to stand as a bar to the relief sought, and particularly as to the effect of part performance.

Doctrine only concerns contracts respecting land.

1. The equity of part performance only applies to contracts respecting land. Thus, it does not affect other contracts within the statute: *e. g.*, a contract not to be performed within a year (*i*). And specific performance will not be decreed of an agreement to leave money by will (*k*). A contract to acquire an easement has been held to be within the doctrine (*l*).

Acts must be referable to the agreement.

2. The acts alleged as amounting to part performance must be such as are not only referable to the alleged agreement, but such as are referable to no other title. And, again, they must be acts so clear, certain, and definite in their object and design, as to refer exclusively to a complete and perfect agreement of which they are part execution.

Not merely introductory or ancillary.

Thus acts merely introductory or ancillary to an agreement, although attended with expense, are not considered acts of part performance. Under this head are included the delivery of abstracts of title, giving orders for conveyances to be drawn and engrossed, going to view an estate, employing surveyors to value timber on an estate, or appraisers to value stock or land, registering deeds, and similar acts of an equivocal or preparatory nature, which will not suffice to take a case out of the statute (*m*).

Part payment not sufficient.

3. Part payment, or even entire payment of the purchase-money, is not sufficient to entitle to relief. Here the legal remedy would be quite adequate, return of the money, with interest, being a complete redress (*n*).

(*i*) *Brittain v. Rossiter*, 11 Q. B. D. 123; *Re Whitehead*, 14 Q. B. D. 419.

(*k*) *Maddison v. Alderson*, 8 App. C. 467; *Caton v. C.*, 2 L. R. H. L. 127.

(*l*) *McMannus v. Cooke*, 35 Ch. D. 681.

(*m*) *Hawkins v. Holmes*, 1 P.

Wms. 770; *Pembroke v. Thorpe*, 3 Swanst. 437, n.; *Whitechurch v. Bevis*, 2 Bro. C. C. 559, 566; *Cooth v. Jackson*, 6 Ves. 17; *Phillips v. Edwards*, 33 Beav. 440.

(*n*) *Clinan v. Cooke*, 1 S. & L. 22, 40; *Hughes v. Morris*, 2 De G. M. & G. 349, 356; *Humphreys v. Green*, 10 Q. B. D. 148.

4. Whether or not admission into the possession of an estate will be considered part performance depends on circumstances. If it has unequivocal reference to the contract, it is sufficient. That a stranger should be found in acknowledged possession of the land of another is strong evidence of an antecedent agreement, and is usually sufficient to warrant an application for relief in equity (*o*); *a fortiori* where (as in the principal case), in addition to possession, the plaintiff has laid out money on the land (*p*). Possession, when sufficient.

On the other hand, if the possession can be reasonably accounted for apart from the alleged contract, it will not suffice; for instance, if in a suit for the specific performance of an alleged agreement for a lease, the tenant was in possession under a previous tenancy, he cannot set up that as a part performance (*q*). Or if a farm tenant from year to year continues in possession, and lays out such moneys as are usual in the ordinary course of husbandry, this is no part performance (*r*). Such continuance in possession, however, if accompanied by payment of an increased rent, referable to the alleged agreement, has been held to be an act of part performance (*s*); and similarly, if, while continuing in possession, he has laid out money, not merely in ordinary acts of husbandry, but in a manner which points to a special agreement (*t*). When not so.

Moreover, where the fact of possession is set up as a part performance, it is essential that the possession should have been delivered according to the contract (*u*). It is evident that a wrongful possession could not operate as a title to the consideration of the Court.

5. Marriage is not a part performance of an agreement in Marriage not sufficient.

(*o*) *Aylesford's Case*, 2 Str. 783; *Mundy v. Jolliffe*, 5 My. & Cr. 167; *Pain v. Coombs*, 1 De G. & J. 34, 46.

(*p*) *Crook v. Corp. of Seaford*, 6 Ch. 551.

(*q*) *Wills v. Stradling*, 3 Ves. 378.

(*r*) *Brennan v. Bolton*, 2 Dr. & War. 349.

(*s*) *Nunn v. Fubian*, 1 Ch. 35.

(*t*) *Mundy v. Jolliffe*, *sup.*; *Sutherland v. Briggs*, 1 Ha. 26.

(*u*) *Cole v. White*, cited 1 Bro. C. C. 409.

relation to it, the Statute of Frauds expressly enacting that every agreement made in consideration of marriage must be in writing (*x*). Nevertheless, a contract made in consideration of marriage may be taken out of the statute by acts of part performance independent of the marriage; for instance, by giving up possession of property agreed to be settled (*y*).

Representations connected with marriage.

Again, where a person marries upon faith of representations or promises made to him for the purpose of influencing his conduct with reference to the marriage, the person making such representations or promises will be compelled in equity to make them good, not only at the instance of the person to whom they were made, but also at the instance of the issue of the marriage (*z*). The representation or promise must, however, be clear and absolute (*a*), and the marriage must be distinctly ascribable thereto (*b*). If there is a written agreement after marriage, in pursuance of a previous parol agreement, this takes the case out of the statute (*c*).

On a similar principle, an injunction was granted to restrain the enforcement of a demand, the party seeking to enforce it having, while the marriage treaty was pending, falsely represented to the father of the lady that there was no such demand existing (*d*).

Where the representation is not of an existing fact, but of a mere intention, or where the promisor refuses to bind himself by a contract, giving the party to understand that he must rely upon his honour for the fulfilment of the promise, the Court cannot enforce performance (*e*).

(*x*) *Warden v. Jones*, 23 Beav. 487; 2 De G. & J. 76; *Caton v. C.*, 2 L. R. H. L. 127.

(*y*) *Surcombe v. Pinniger*, 3 De G. M. & G. 571; *Ungley v. U.*, 5 Ch. D. 887.

(*z*) *Hammersley v. De Biel*, 12 C. & F. 45; *Walford v. Gray*, 13 W. R. 335, 761.

(*a*) *Randall v. Morgan*, 12 Ves. 67.

(*b*) *Goldieutt v. Townsend*, 28 Beav. 445.

(*c*) *Surcombe v. Pinniger*, *sup.*

(*d*) *Neville v. Wilkinson*, 1 Bro. C. C. 543.

(*e*) *Maunsell v. White*, 4 H. L. 1039; *Jordan v. Money*, 5 H. L. 185; 15 Beav. 372; 2 De G. M. & G. 318.

6. Companies and corporations are equally with individuals bound by acts of part performance (*f*). An agreement by a corporation to let land upon lease, although not under seal, will be enforced against the corporation, where there have been acts of part performance on the part of the intended lessee (*g*). Contracts of companies, &c.

7. Sales of land by auction are generally within the Statute of Frauds. A purchaser, therefore, is not bound unless there is some agreement in writing (*h*). Auctions.

But if a purchaser takes possession after the sale, and commits acts of ownership, it will be held to be part performance, so as to entitle the vendor to enforce the sale as regards the lots so occupied and dealt with, though not of other lots sold at the same time (*i*). The signature of the auctioneer, or his clerk, has been held to satisfy the statute, on the ground that he is constituted agent of the purchaser by the act of bidding (*k*). But in order to this, the auction book must embody, or at least refer to, the conditions of sale (*l*).

Sales under a decree of the Court, or in bankruptcy, have been held to be excepted from the statute (*m*). Miscellaneous contracts.

It has been said that the doctrine of part performance is not to be extended by the Court, and it was held inapplicable to a case in which a trustee had a power to lease at the request, *in writing*, of a married woman, and such request had not been made (*n*).

A family arrangement for the division of land, although only verbal, has been carried out where there have been acts of part performance by the parties interested, such as

(*f*) *Wilson v. W. H. R. Co.*, 34 Beav. 187; 2 De G. J. & Sm. 475.

(*g*) *Crook v. Corp. of Seaford*, 6 Ch. 551.

(*h*) *Blagden v. Bradbear*, 12 Ves. 466, 472.

(*i*) *Buckmaster v. Harrop*, 13 Ves. 456, 474.

(*k*) *Peirce v. Corf*, 9 L. R. Q. B. 210; *Bird v. Boulter*, 4 B. & Ad. 443.

(*l*) *Rishton v. Whatmore*, 8 Ch. D. 467.

(*m*) *Att.-Gen. v. Day*, 1 Ves. sr. 218; *Exp. Cutts*, 3 Deac. 267.

(*n*) *Phillips v. Edwards*, 33 Beav. 440.

holding and dealing with the land in accordance with the terms of the arrangement (*o*).

II. *Other Grounds for Relief.*

Grounds other than part performance.

There are grounds other than part performance, in consideration of which the Court, deeming it inequitable for a defendant to set up the statute as a defence, will decree specific performance.

Fraud of defendant.

1. Where the agreement was intended to have been in writing according to the statute, but this has been prevented from being done by the fraud of the defendant, equity has relieved. Otherwise the statute, designed to suppress fraud, would be used as a protection for it. Thus, if one agreement is fraudulently substituted for another, or if in case of a loan on mortgage, it is agreed that the security is to be in the form of an absolute deed by the mortgagor and a defeasance by the mortgagee, and the absolute conveyance being executed, the mortgagee refuses to execute the defeasance, equity will grant relief (*p*).

The principle that a statute shall not be made an instrument for covering a fraud has been illustrated by cases in which equity has not allowed parties to profit where they have fraudulently induced a person to make or refrain from altering a will, the mode of making which was formerly regulated by ss. 5 and 19 of the Statute of Frauds, and is now by the Wills Act (*q*).

Analogous cases under the Wills Act.

Thus, if a person, knowing that a testator in making a disposition in his favour intends it to be applied for purposes other than his benefit, expressly promises, or by silence implies, that he will carry the testator's intentions into effect, and the property is left to him upon faith of

(*o*) *Williams v. W.*, 2 Dr. & Sm. 378; 2 Ch. 294.

(*p*) *Joynes v. Statham*, 3 Atk. 389; *Lincoln v. Wright*, 4 De G. & J. 16.
(*q*) 1 Vict. c. 26.

that promise or undertaking, it is in effect a trust, and the devisee will not be allowed to shelter himself behind the Wills Act (*r*). It would be otherwise if the omission to declare the trust according to the statute arose from the neglect or error of the testator uninfluenced by the devisee (*s*). But *quere* whether the heir could claim on the ground of an absence of intention to benefit the devisee (*t*). The same principle applies to a case where property has been suffered to descend owing to similar representations made by the heir (*u*).

See *supra* (p. 639) as to cases where the trusts intended would be contrary to the law; *e.g.*, of mortmain.

The onus lies on the plaintiff of showing that a trust for a charity was communicated to and expressly or tacitly accepted by the devisees; if this is not admitted by the defendants it may be proved by evidence *aliundè* (*x*).

III. *Evidence of Parol Variations.*

The consideration of the effect of the Statute of Frauds in suits for specific performance cannot be dismissed without reference to the important class of cases which have turned upon the question of the admissibility of parol evidence of alleged variations from the written agreement.

The leading principle which guides the Court in deciding this question cannot be better illustrated than by reference to the case of

TOWNSHEND v. STANGROOM

[6 Ves. 328].

There a lessor filed a bill for specific performance of a written agreement for a lease, alleging a parol variation as

Evidence as to parol variations in the contract.

Generally not admissible to support a claim for specific performance; but admissible in defence.

(*r*) *Jones v. Badley*, 3 Ch. 364.

(*s*) *Adlington v. Cann*, 3 Atk. 151.

(*t*) *Russell v. Jackson*, 10 Ha. 204; *Muckleston v. Brown*, 6 Ves. 52; *Rowbotham v. Dunnett*, 8 Ch.

D. 431.

(*u*) *Stickland v. Aldridge*, 9 Ves.

516, 519; *M'Cormick v. Grogan*, 4

L. R. H. L. 82, 88.

(*x*) *Edwards v. Pike*, 1 Eden, 267.

to the quantity of land included; and the lessee filed a cross-bill for specific performance of the agreement simply as written. Lord Eldon dismissed both bills; the lessor's, because parol evidence *was not* admissible for him as plaintiff to set up an agreement different from that which was written; the lessee's, because the very same evidence *was* admissible on the part of the lessor by way of defence (*y*).

The rule rests on general principles of law.

1. These cases are conspicuous among many decisions which have well established the difference between the evidence which is available for a plaintiff seeking and a defendant resisting specific performance of a contract. Although the question as to the admissibility of parol evidence is affected by the Statute of Frauds, it does not wholly rest thereon. Independently of the statute, by "the general rules of evidence, writing stands higher in the scale than mere parol testimony, and when treaties are reduced to writing such writing is taken to express the ultimate sense of the parties, and is to speak for itself. In the case of a contract respecting land, the general idea receives weight from the circumstance that you cannot contract at all on that subject but in writing; and this, therefore, is a further reason for rejecting parol evidence. In this way only is the Statute of Frauds material, for the foundation and bottom of the objection is in the general rules of evidence" (*z*).

General illustrations.

The rule, then, is that parol evidence on the part of a plaintiff seeking performance of a written contract, with a variation supported by such evidence, will be rejected, notwithstanding that the difference of the written from the real agreement is the result of fraud, accident, or surprise. Thus, a plaintiff cannot adduce evidence to prove that lands comprised in a written agreement were by parol agreed to be left out of a lease (*a*), nor to prove verbal

(*y*) See also *Woolam v. Hearn*, 7 Ves. 211; 2 W. & T. L. C. 468.

(*z*) *Davis v. Symonds*, 1 Cox, 402.
(*a*) *Lawson v. Laude*, 1 Dick. 346.

declarations at an auction in opposition to printed conditions of sale (*b*), nor that a written agreement to sell to two jointly was in reality an agreement to sell to one of them, and that the other was to have some interest in the premises by way of security for such part of the purchase-money as he might advance (*c*), nor in any similar case (*d*).

2. On the principle, however, already explained in connexion with *Lester v. Foxcroft*, that part performance will serve the purpose of evidence which is otherwise wanting, it is established that when the alleged parol variation has been partly performed, specific performance of the written agreement with the parol variation will be decreed (*e*). In such cases the parol variation is in fact treated as a new agreement partly performed; and it is considered that such agreement, having been acted upon, cannot be disregarded without injustice (*f*).

Exception.
Parol variation partly performed.

3. It is equally well established that it is open to a defendant in certain circumstances to resist a claim for specific performance by means of parol evidence designed to show that the real agreement was not that which is represented in the writing, and that its enforcement would be, therefore, inequitable. This is, indeed, no infringement of the statute, which "does not say that a written agreement shall bind, but that an unwritten agreement shall not bind" (*g*).

When available in defence.

The circumstances, always of much weight in equity, which entitle a defendant to make use of such evidence, are fraud, mistake, or surprise (*h*).

Where the terms of a written agreement have been ambiguous, so that, adopting one construction, they may reasonably be supposed to have an effect which the

(*b*) *Jenkinson v. Pepys*, cited 1 V. & B. 528.

(*c*) *Davis v. Symonds*, *sup.*

(*d*) *Clinan v. Cooke*, 1 S. & L. 22, 30.

(*e*) *Anon.*, 5 Vin. Abr. 522, tit. 38; *Legal v. Miller*, 2 Ves. sr. 299.

(*f*) *Pitcairn v. Osbourne*, 2 Ves. sr. 375.

(*g*) *Clinan v. Cooke*, 1 S. & L. 22, 39.

(*h*) *Joyes v. Statham*, 3 Atk. 388; *Clowes v. Higginson*, 1 V. & B. 524; *Mausser v. Back*, 6 Ha. 443.

defendant did not contemplate, the Court has on that ground refused to enforce the agreement (*h*); the author of the ambiguity has even himself had the benefit of this principle (*i*).

But it appears that, in the case of a misunderstanding between the parties, the plaintiff is entitled to waive his contention as to the construction, and to insist on specific performance of the contract as understood by the defendant (*j*). But such a case must be distinguished from those in which the difference between the parties is of such a nature that there is really no contract at all for want of a *consensus ad idem* (*k*). The distinction clearly rests on the nature and degree of the difference between the parties.

The admissibility of parol evidence in defence is not confined to matter collateral to and independent of the written agreement, but may amount even to a contradiction of it (*l*).

When not so.

It is not sufficient, however, to entitle the vendor to the benefit of such evidence, that the contract is not precisely such as he expected it to be. A mere unproved suspicion of fraud in the plaintiff (*m*), or a mistake of law, or as to the legal effect of the contract, or the legal consequences of an act (*n*), or a mistake as to the interest which the purchase will enable a person to acquire (*o*), cannot be set up as a defence. And if mistake of fact is alleged it must be clearly proved (*p*). Further, an inadvertent omission to propose an intended term to an agreement (*q*), or its

(*h*) *Calverley v. Williams*, 1 Ves. 210; *Clowes v. Higginson*, 1 V. & B. 524.

(*i*) *Neap v. Abbott*, C. P. Coop. 333.

(*j*) *Preston v. Luck*, 27 Ch. D. 197.

(*k*) *Marshall v. Berridge*, 19 Ch. D. 233.

(*l*) *Ramsbottom v. Gosden*, 1 V. & B. 165; *Winch v. Winchester*, *ib.* 375.

(*m*) *Lightfoot v. Heron*, 3 Y. & C. Ex. 586.

(*n*) *Cooper v. Phibbs*, 2 L. R. H. L. 149; *Powell v. Smith*, 14 Eq. 85; *G. W. R. v. Cripps*, 5 Ha. 91.

(*o*) *Mildmay v. Hungerford*, 2 Vern. 243.

(*p*) *Darnley v. L. C. & D. R.*, 2 L. R. H. L. 43.

(*q*) *Parker v. Taswell*, 2 De G. & J. 559.

purposed omission, upon the supposition that it was illegal, is not sufficient (*r*).

4. An analogous class of cases is that in which two contracts are alleged by the defendant to be mutually dependent, and he claims to resist the performance of one until the plaintiff performs the other, parol evidence being necessary to connect the two. In *Croome v. Lediard* (*s*) such evidence was rejected, and the plaintiff's prayer granted, though the defendant could not make a good title to the estate he wished to sell, and he sought to prove that the whole transaction was intended as an exchange. Lord Brougham rejected the tendered evidence, on the ground that evidence of matter *dehors* the written agreement was not admissible to alter the terms and substance of the contract: though evidence of matter collateral to it might be received. But Lord St. Leonards, in commenting on the case, has considered that the proper ground was the absence of any proof of fraud, mistake, or surprise (*t*).

5. A clearly proved parol waiver of a written contract, amounting to a complete abandonment, will bar specific performance (*u*). And where a written agreement is *subsequently* varied by parol, upon proceedings being taken for specific performance with or without the variation, the Court will, it seems, put the defendant to his election, and if he declines to elect, will decree specific performance of the agreement without the variation (*x*). But it seems that parol evidence of a contemporaneous variation in or addition to an agreement, which was by admission correctly put into writing, is not admissible as a defence to specific performance (*y*).

6. Although it will be a good defence to show that a Plaintiff may

(*r*) *Irnham v. Child*, 1 Bro. C. C. 92; see also *Cross v. Berridge*, 8 Ch. 359.

(*s*) 2 My. & K. 251.

(*t*) Sugd. V. & P. 163, 14th ed.;

Lloyd v. L., 2 My. & Cr. 192.

(*u*) *Price v. Dyer*, 17 Ves. 356.

(*x*) *Robinson v. Page*, 3 Russ. 114.

(*y*) *Ormerod v. Hardman*, 5 Ves.

722.

assent to
parol varia-
tion.

written agreement does not contain a provision in favour of a defendant verbally agreed upon between the parties, nevertheless, when such a verbal agreement is alleged, the plaintiff may, by submitting to perform the omitted provision, and in the absence of fraud or mistake with reference to it, obtain a decree for performance of the whole contract (z). And there are many cases in which the effect of the evidence has been, not to defeat the plaintiff's claim to specific performance, but to lead the Court to perform the contract, taking care that the parol agreement is also carried into effect, so that all the parties may have the benefit of what they contracted for (a).

(z) *Martin v. Pycroft*, 2 De G. M. & G. 785; *Preston v. Luck*, 27 Ch. D. 497.

(a) *Ramsbottom v. Gosden*, 1 V. & B. 165; *L. & B. R. Co. v. Winter*, Cr. & Ph. 57; *Smith v. Wheatcroft*, 9 Ch. D. 223.

SECTION IV.—SPECIFIC PERFORMANCE WITH A VARIATION.

Contrast of Law and Equity.

Seton v. Slade.

- I. *Where the Dispute relates to Time.*
 1. *When time is essential.*
 2. *When not so.*
 3. *Compensation.*
- II. *Where the Dispute relates to Quantity or Quality.*
 1. *In vendors' suits.*
 2. *In purchasers' suits.*

Having examined the general principles which determine whether or not a suit for specific performance of a contract will lie in equity, we are now led to consider the force of a peculiar class of defences which may be used in answer to such a claim, and to observe the manner in which equity deals therewith. There is scarcely any branch of the subject of equitable jurisdiction more fertile in illustrations of the contrast between the principles and methods of equity and those which prevailed in the Courts of Common Law.

Defences peculiar to suits for specific performance.

In the important case of

SETON v. SLADE

[7 Ves. 265; 2 W. & T. L. C. 501]

the defendant agreed to purchase certain property from the plaintiff. The memorandum of agreement was signed by him, but not by the plaintiff. One of the terms thereof was that a good title to the property was to be made within two months, and the purchase was to be

completed within that time. The abstract of title was only delivered within a few days of the expiration of the two months, but the defendant received and retained it without objection until the expiration of the two months. On a bill for specific performance of the agreement, it was held that the defendant could not insist on the time as of the essence of the contract, and specific performance was decreed.

In many respects analogous to this are other cases in which the dispute as to performance rests not upon the question of time, but upon the fact that the vendor has not the same interest in the estate as that which he contracted to sell; or that there is some deficiency in the quantity or quality of it. In such cases a party not able strictly to perform his contract had no remedy at law by way of damages; but in equity he might often obtain specific performance, adequate compensation being allowed for the partial departure from the contract.

At the suggestion, therefore, of this case we may conveniently investigate the general circumstances under which, though the plaintiff cannot strictly carry out his agreement, he will obtain specific performance on allowing compensation.

Application
by summons
under 37 & 38
Vict. c. 78,
s. 9.

This is a fitting place in which to mention a recent useful enactment which has been the means of saving considerable expense in case of disputes such as we are about to consider. By the Vendor and Purchaser Act, 1874 (*b*), it is provided that a vendor or purchaser of real or leasehold estate in England may apply in a summary way to a judge in Chambers in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of the contract (not being a question affecting the existence or validity of the contract), and the judge shall make such order upon the application as to him shall appear just.

(*b*) 37 & 38 Vict. c. 78, s. 9.

And in proceedings under this Act, the Court has jurisdiction not only to answer the question submitted, but to give all consequential directions, *e.g.*, to order a return of the deposit with interest when a vendor has failed to make a title (c).

I. *Where the Dispute relates to Time.*

In the Courts of law previous to the passing of the Judicature Act of 1873, time was in all cases considered as of the essence of the contract. By that Act, however, it is enacted (d) that "stipulations in contracts as to time" or otherwise, which would not before the passing of this Act have been deemed to be, or to have become, of the essence of such contracts in a Court of equity, shall receive in all Courts the same construction and effect as they would have heretofore received in equity." Equitable principles, therefore, in this as in other matters, now prevail in all the Courts; so that when we speak hereafter of a distinction between the rules of law and equity, we must be understood to refer to the state of things previous to the 1st of November, 1875.

Time formerly essential at law.

Judicature Act, s. 25, sub-s. 7.

Though, as in the principal case, equity usually considers time to be a circumstance, and not of the essence of a contract, there are other cases in which its treatment is as strict as that of law. It will be well, therefore, to consider these classes of contracts separately; and first, the smaller and exceptional class.

1. *Where time is deemed essential.*

Equity is induced to treat time as of the essence of a contract either in consideration of the nature of the property concerned, or on account of the special agreement to that effect of the parties.

Time, when essential in equity.

(c) *Re Hargreave's and Thompson's Contract*, 32 Ch. D. 454.

(d) Sect. 25, sub-s. 7.

- Property of fluctuating value. (1.) **From the nature of the property.**
 (i.) Where the thing is of greater or less value, according to the effluxion of time, such as a reversion, equity requires strict adherence to time. Such contracts are generally occasioned by the vendor's present want of money, and to give him interest thereon during a long delay is no compensation to him (*e*). Within the same principle is included property of an unusually fluctuating value, such as a mining lease, or foreign stock (*f*); or of a wasting character, as a life annuity or leaseholds (*g*).
- Mercantile contracts. (ii.) Equity is disposed to treat mercantile contracts generally with greater strictness than contracts relating to land (*h*). The purpose of the purchase is considered as influencing the construction of the contract: thus, time is insisted on where premises are needed for commercial purposes (*i*), or with a view to immediate residence (*k*), or the money is required for paying off debts of the vendor (*l*). It may be added, that the tendency of modern decisions is to bind parties more strictly to the terms of their agreements.
- Purpose of the purchase. (iii.) In the absence of express stipulation to the contrary, time is always regarded as essential in the sale of a public-house as a going concern (*m*), and the licence must be transferred promptly.
- Sale of public-house. (iv.) An option to purchase under a right of pre-emption is always construed strictly, and must be exercised at the time prescribed (*n*).
- Right of pre-emption. (2.) **By special agreement of the parties.**
 (i.) It was at one time held that the parties could not make time of the essence of a contract any more than they
- By special agreement of the parties. Generally.

(*e*) *Newman v. Rogers*, 4 Bro. C. C. 393.

(*f*) *Macbryde v. Weeks*, 22 Beav. 533; *Doloret v. Rothschild*, 1 S. & S. 590.

(*g*) *Hudson v. Temple*, 29 Beav. 536.

(*h*) *Reuter v. Sala*, 4 C. P. D. 239.

(*i*) *Walker v. Jeffreys*, 1 Ha. 341; *Parker v. Frith*, 1 S. & S. 190, n.

(*k*) *Tilley v. Thomas*, 3 Ch. 61.

(*l*) *Popham v. Eyre*, Loft. 786.

(*m*) *Day v. Lühke*, 5 Eq. 336.

(*n*) *Brooke v. Garrod*, 3 K. & J. 608.

could contract themselves out of the operation of the principles of equity as to the redemption of mortgages, or the penalties of bonds; but it is now established that if by the contract it clearly appears to be the intention of the parties, if, for instance, they stipulate that the agreement shall be void unless the purchase be completed on a given day, equity will treat the fixture of time as essential (*o*).

It nevertheless requires a strict stipulation to effect that object in contracts relating to the sale of land (*p*). A mere stipulation that an abstract shall be given, or possession delivered on a named day, will not suffice (*q*). A stipulation that time shall be of the essence of the contract with regard to one of the steps towards completion, raises a presumption that it was not intended to be so with regard to others (*r*); and if the contract evidently contemplates an extension of the time beyond the day fixed, as by fixing interest to be thereafter paid upon the purchase-money, time will not be strictly regarded (*s*).

Though time be not originally of the essence, yet, where there has been great and unreasonable delay on one side, the other party has a right to fix a reasonable time within which the contract is to be completed, and that time will be regarded and insisted on by equity (*t*). But the notice to be effective must be reasonable (*u*); and if time is not originally of the essence of the contract, it cannot be made so by notice unless there has been some default or unreasonable delay (*x*).

(ii.) If time has been made of the essence of the contract by agreement, or is considered so by reason of the nature of the property, or becomes so by notice during

(*o*) *Hudson v. Bartram*, 3 Madd. 440; *Boehm v. Wood*, 1 J. & W. 419; *Hudson v. Temple*, *sup.*

(*p*) *Webb v. Hughes*, 10 Eq. 286.

(*q*) *Roberts v. Berry*, 3 De G. M. & G. 284; *Tilley v. Thomas*, *sup.*

(*r*) *Wells v. Maxwell*, 32 Beav. 408.

(*s*) *Webb v. Hughes*, *sup.*

(*t*) *King v. Wilson*, 6 Beav. 126.

(*u*) *Wells v. Maxwell*, *sup.*; *Crawford v. Toogood*, 13 Ch. D. 153.

(*x*) *Green v. Sevin*, 13 Ch. D. 589; and see as to forfeiture of deposit, p. 231, *sup.*

progress of the transaction, it may be enlarged or waived by subsequent agreement, or by conduct of the parties. Thus, if negotiations go on after the fixed time has passed, it amounts to a waiver (*y*), unless the negotiations were expressly conditioned to be without prejudice to the legal position (*z*). And if, as in *Seton v. Slade* (*a*), the purchaser is aware of the objections to the title, or if he receives the abstract after the day appointed, or proceeds with the purchase after the completion of the time fixed, unless, at least, he does so under protest (*b*), he will be held to have waived his right to object to the delay, and will not be able to resist specific performance (*c*). And likewise, if a vendor receives and entertains the requisitions of the purchaser after the time specified, unless he reserves his right he will be deemed to have waived it (*d*). The time within which objections are to be made to a title may, of course, be enlarged by the vendor's consent (*e*).

Ground of
rescission.

(iii.) The vendor may, it seems, insist upon the contract being rescinded, where circumstances exist which render it improbable that the purchase-money can be paid for a long time, as the bankruptcy or death of the purchaser, and the inability of his representatives to get in assets (*f*), and the omission to require payment of the deposit will not deprive him of his right to insist that the contract be rescinded, where he has taken other sufficient steps for that purpose (*g*).

Mala fides
repels usual
rule.

(iv.) Although time may be made of the essence of the contract in reference to any matter appearing upon the abstract, as, for instance, in taking objections to the title, an exception from the ordinary rule will arise in such case, and time will not be considered essential for taking such

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| (<i>y</i>) <i>Boyes v. Liddell</i> , 6 Jur. 725 ; | My. 293. |
| <i>Pegg v. Wisden</i> , 16 Beav. 239. | (<i>d</i>) <i>Oakden v. Pike</i> , 11 Jur. N. S. |
| (<i>z</i>) <i>Tilley v. Thomas</i> , 3 Ch. 61. | 666. |
| (<i>a</i>) <i>Supra</i> , p. 671. | (<i>e</i>) <i>Cutts v. Thodey</i> , 13 Sim. 206. |
| (<i>b</i>) <i>Magennis v. Fallon</i> , 2 Moll. | (<i>f</i>) <i>Mackreth v. Marlar</i> , 1 Cox, |
| 576. | 259. |
| (<i>c</i>) <i>Pincke v. Curteis</i> , 4 Bro. C. C. | (<i>g</i>) <i>Watson v. Reid</i> , 1 Russ. & |
| 329 ; <i>Hoggart v. Scott</i> , 1 Russ. & | My. 236. |

objection, where there has been unfair dealing and a plain want of *bona fides* on the part of the vendor; as where the conditions were so framed as to deceive the purchaser, or throw him off his guard (*h*).

2. *Where time is not deemed an essential.*

Time when
not deemed
essential.

The delay occasioning the objection will arise either from the conduct of the parties, or from the state of the title.

(1.) **From the conduct of the parties.**

Where delay
arises from
conduct of
parties
generally.

(i.) The principal case shows the view taken by Courts of equity as to contracts generally—namely, that the general object being only the sale of an estate for a given sum, the particular day named is merely formal, and that the stipulation means in truth that the purchase shall be completed within a reasonable time, regard being had to all the circumstances of the case; and, as in the case of mortgages, it acts on the general intention rather than on the particular words of the stipulation. The rule is, then, that it will grant the relief of specific performance, notwithstanding a failure to keep the dates assigned by the contract, if it can do justice to the parties, or if there is nothing in the stipulations between the parties, the nature of the property, or the surrounding circumstances which would make it inequitable to interfere with and modify the legal right. At law the vendor was bound to have his title deeds and abstract ready at the appointed time. In equity it is not solely incumbent upon the vendor to move by making a tender of the abstract, but it is also incumbent upon the purchaser to ask for it at the appointed day, or on such other day as will leave sufficient time for the completion of the contract. Otherwise the time would be considered as waived (*i*). So if the abstract were delivered after the appointed day, and the purchaser made

* (*h*) *Boyd v. Dickson*, 10 I. R. Eq. 239.

(*i*) *Guest v. Homfray*, 5 Ves. 818; *Jones v. Price*, 3 Anstr. 924.

no objection to the delay, he would be considered to have waived it (*k*).

If, however, the vendor does not deliver his abstract promptly, he of course cannot hold his purchaser to send in his objections in the time limited, even though it may have been stipulated that time in that respect should be of the essence of the contract (*l*).

Exceptional
cases.

(ii.) Equity, however, does not go so far as to enforce performance on a purchaser when the vendor has taken no steps whatever to complete the contract, and the purchaser has without delay insisted on his deposit and refused to proceed; nor would it have granted an injunction to restrain the purchaser from suing for his deposit at law (*m*). Unreasonable delay will of itself be a bar to either party obtaining a decree. "A party must show himself ready, desirous, prompt, and eager," in calling for the assistance of the Court (*n*), and a continual claim, without any active steps in support of it, will not keep alive a right which would otherwise be barred by *laches* (*o*).

This rule has been relaxed where a strict application of it would work injustice, as where after an agreement for a lease the intended lessee had entered into or remained in possession, and no further steps were taken to formally complete the contract until fourteen years had expired (*p*). But the fact that a purchaser has paid part of the purchase-money is not sufficient to entitle him to assistance, if he has lain by and delayed completion for an unreasonable time (*q*). Equity will not countenance parties in delaying matters with a view to see whether the contract will prove advantageous or not, and accordingly either to abandon it,

(*k*) *Smith v. Burnam*, 2 Anstr. 527.

(*l*) *Upperton v. Nickolson*, 6 Ch. 436.

(*m*) *Lloyd v. Collett*, 4 Bro. C. C. 469.

(*n*) *Milward v. E. of Thanet*, 5

Ves. 720, n.

(*o*) *Lehmann v. McArthur*, 3 Eq. 746; 3 Ch. 496.

(*p*) *Shepherd v. Walker*, 20 Eq. 659.

(*q*) *Harrington v. Wheeler*, 4 Ves. 686.

or claim specific performance (*r*). Nor will a purchaser be aided who has taken trifling and vexatious objections to the title, and shown a disinclination to proceed (*s*), or is clearly unable to pay the purchase-money (*t*).

The granting or withholding of specific performance being discretionary, equity has sometimes refused to assist a party who is out of time on the general ground that the contract is inequitable, or the price unreasonable (*u*).

(2.) From the nature of the title.

The general rule is, that if a vendor commence an action for specific performance, he is entitled to assistance if he can procure a good title at the time of the decree. It is immaterial that he had not a title when entering into the articles for sale (*x*). It ought, however, generally to be made out in time for the certificate of the chief clerk, though this has not uniformly been insisted upon (*y*).

From the nature of the title.
General rule.

Where the objection to the vendor's title is that there is an interest outstanding in a third party, and the purchaser buys up that interest, he can no longer resist specific performance on the ground that it is not in the vendor (*z*).

The tendency of decisions is now against the practice of compelling a purchaser to take an estate of which the title is not made out till after the time fixed by the contract, and the purchasers have been allowed the benefit of many slight circumstances in their favour; for instance, that a new suit has become necessary, or that an account of debts remains to be taken in a suit, &c. (*a*).

Tendency of modern decisions.

3. Compensation.

In all cases in which specific performance has been Compensation

(*r*) *Alley v. Deschamps*, 13 Ves. 225.

(*s*) *Hayes v. Caryll*, 1 Bro. P. C. 126.

(*t*) *Gee v. Pearse*, 2 De G. & Sm. 325; *Aberaman Iron Works v. Wiekens*, 5 Eq. 485.

(*u*) *Whorwood v. Simpson*, 2 Vern. 186.

(*x*) *Langford v. Pitt*, 2 P. Wms. 630.

(*y*) *Coffin v. Cooper*, 14 Ves. 205.

(*z*) *Murrell v. Goodyear*, 1 De G. F. & J. 432.

(*a*) *Lechmere v. Brasier*, 2 J. & W. 289; *Dalby v. Pullen*, 3 Sim. 29; *Fraser v. Wood*, 8 Beav. 339.

for default in time,

decreed notwithstanding discrepancy in time or in substance of the contract, care has been taken that proper compensation should be made, and the parties in fact put in the same situation as if the contract had been strictly fulfilled.

how calculated.

Interest.

Ordinarily a purchaser is entitled to the profits of the estate from the time at which the contract ought to have been completed (*b*), and the vendor is entitled to interest on the unpaid purchase-money from the same time (*c*). But where the purchaser was in default of payment, under a contract by which the vendor was not bound to give up possession until payment, and the vendor, who occupied the property for the purpose of his business, continued the business on his own behalf under a pressure arising from the plaintiff's default, the vendor was adjudged to receive interest on his money, but not to pay an occupation rent for the premises from the time when the contract was made (*d*).

Where no time is fixed for completion, interest is usually payable by the purchaser from the time of taking possession (*e*). The purchaser, moreover, by taking possession, is deemed to have accepted the title (*f*), though this will not relieve the vendor from perfecting the title if it is in his power to do so.

Rents and profits.

In the case of sales by the order of the Court, if the estate be in possession, the purchaser will be entitled to the rents and profits from the quarter-day preceding his purchase, he paying his purchase-money before the following one (*g*). If the estate be reversionary, the purchaser will be entitled to any benefit from the dropping of lives after

Accessions.

(*b*) *De Fisme v. De F.*, 1 Mac. & Gr. 346.

(*c*) *Lowther v. C. of Andover*, 1 Bro. C. C. 396; *Calcraft v. Roebuck*, 1 Ves. 221.

(*d*) *Leggatt v. Met. Ry. Co.*, 5 Ch. 716.

(*e*) *Birch v. Joy*, 3 H. L. 565; *Ballard v. Strutt*, 15 Ch. D. 122.

(*f*) *Re Gloag and Miller's Contract*, 23 Ch. D. 320.

(*g*) *Mackrell v. Hunt*, 2 Madd. 34, n.

the time of confirming the report absolute, and will consequently be liable to pay interest from that time (*h*).

If there has been delay in making out the title, and the property has deteriorated by dilapidations or mismanagement, compensation will be allowed to the purchaser (*i*), but not for deterioration after the time when he ought to have taken possession (*h*), and of course not for deterioration occasioned by himself (*l*). Deteriorations.

Timber blown down after the contract will belong to the purchaser (*m*); and if common timber be felled after that time by the vendor, compensation must be paid to the purchaser (*n*). If the vendor, on the contrary, after the contract, lays out money in improvements, he cannot call upon the purchaser to repay it (*o*). In the absence of any express stipulation, the expenses and outgoings of property sold must be borne by the vendors, down to the time when the purchaser could prudently take possession, *i. e.*, when a good title can be shown (*p*). Improvements.

When time is of the essence of the contract, and the purchaser obtains a decree for specific performance, he will be entitled to compensation for the loss which he has sustained in consequence of possession not having been given to him according to the contract (*q*).

The general method of ascertaining the amount payable for compensation, is by directing an inquiry to that effect by the chief clerk in chambers. Inquiry at chambers.

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| (<i>h</i>) <i>Exp. Manning</i> , 2 P. Wms. 410; | (<i>n</i>) <i>Magennis v. Fallon</i> , 2 Moll. 591. |
| (<i>i</i>) <i>Foster v. Deacon</i> , 3 Madd. 394. | (<i>o</i>) <i>Monro v. Taylor</i> , 8 Ha. 60. |
| (<i>k</i>) <i>Binks v. Rokeby</i> , 2 Sw. 226. | (<i>p</i>) <i>Carrodus v. Sharp</i> , 20 Beav. 56. |
| (<i>l</i>) <i>Harford v. Purrier</i> , 1 Madd. 532. | (<i>q</i>) <i>Gedge v. Montrose</i> , 26 Beav. 45. |
| (<i>m</i>) <i>Poole v. Shergold</i> , 2 Bro. C. C. | |

II. *Where the Dispute relates to the Quantity or Quality of the Vendor's Interest.*

Disputes as to quantity and quality.

Compensation must be calculable.

Vendors' suits generally.

Difference must not be substantial.

Differences of tenure. What deemed substantial.

The consideration of these cases naturally falls into two divisions, according as to whether the vendor or the purchaser is plaintiff; but it must be remembered that in all cases the condition on which these suits are entertained is that of compensation for the error or misdescription. It follows that the deficiency or difference alleged must be such as to admit of the proper compensation being adequately calculated. Accordingly relief will be refused where, from the nature of the property or the nature of the dispute, the Court considers itself unable to fix or ascertain the amount proper to be allowed (*r*).

1. *Where the vendor seeks specific performance.*

At law, when a person contracted to sell a given interest, for instance, a given term of years, and it turned out that the interest was less than was represented, the purchaser might recover the deposit and rescind the contract, notwithstanding that the vendor might offer compensation. But in equity, if the purchaser can get substantially what he contracted for, the vendor can enforce specific performance against him, allowing compensation for the difference in value. But the amount of variation which equity will recognise as admissible without destroying the contract, is, of course, a matter of degree. In general terms, the misdescription must not be substantial. The particular inquiry is, what is, and what is not, considered substantial.

(1.) The difference often relates to the tenure of land; and it is established that a purchaser cannot be required to accept land of a different tenure from that for which he bargained. Thus leaseholds, however long the term, or copyholds, cannot be substituted for freeholds (*s*), nor free-

(*r*) *Re Bunbury's Estate*, 1 I. R. & G. 109.
Eq. 458; *Ridgway v. Gray*, 1 Mac. (s) *Drew v. Corp*, 9 Ves. 368.

hold for copyhold (*t*); though where the conditions of sale left the tenure doubtful or barred any objection on this ground, and the difference in value was slight, performance was enforced (*u*). Similarly, a perpetual rent-charge will not sufficiently answer the description of a fee simple (*x*), nor can a purchaser be compelled to take an underlease instead of an original lease (*y*). And where the term of a leasehold turns out to be largely different from what was represented, the vendor will not be able to enforce his bargain, *e.g.*, where the contract was for a sixteen years' lease, and the term offered was only six (*z*). A purchaser of an entirety would not be obliged to take an undivided share of the estate (*a*), nor a remainder instead of an estate in possession (*b*), nor an estate subject to unusual easements (*c*), or to an undisclosed reservation of minerals (*d*).

On the other hand, where there are undisclosed quit-rents, and rent-charges, at any rate if of small amount, they are considered fit subjects for compensation (*e*); and similarly, where there was a small error as to the term of a lease (*f*), or a mistake as to the amount of quit-rents sold (*g*). What not.

Objections to the tenure may be waived by the conduct of the purchaser, as by his proceeding with the treaty after notice of the nature thereof, though by such waiver he does not lose his claim to compensation on performance (*h*). Waiver by conduct of purchaser.

(2.) Another class of cases is where the misdescription Differences of quantity or

- (*t*) *Ayles v. Cox*, 16 Beav. 23.
- (*u*) *Price v. Macaulay*, 2 De G. M. & G. 339.
- (*x*) *Prendergast v. Eyre*, 2 Hogan, 81.
- (*y*) *Madeley v. Booth*, 2 De G. & Sm. 718.
- (*z*) *Long v. Fletcher*, 2 Eq. Ca. Ab. 5, pl. 4.
- (*a*) *Att.-Gen. v. Day*, 1 Ves. 218.
- (*b*) *Collier v. Jenkins*, You. 295.
- (*c*) *Scaman v. Vaudrey*, 16 Ves.

- 390.
- (*d*) *Upperton v. Nickolson*, 6 Ch. 436.
- (*e*) *Esdaile v. Stephenson*, 1 S. & S. 122; *Hornblow v. Shirley*, 13 Ves. 81.
- (*f*) *Halsey v. Grant*, 13 Ves. 77.
- (*g*) *Cuthbert v. Baker*, cited Sugd. V. & P. concise view, 219, ed. 1851.
- (*h*) *Fordyce v. Ford*, 4 Bro. C. C. 494; *Catercraft v. Roebuck*, 1 Ves. jr. 221.

boundaries
compensated
if small and
not material
to enjoyment.

relates to the quantity or the boundaries of the estate sold. Though the vendor fails to make a title to a small portion of the estate, if such portion is not material to the possession and enjoyment, specific performance with compensation will be decreed (*i*); but not if the portion is material, as where the contract is for a wharf and a jetty, and it turns out that the jetty is liable to be removed by the Corporation of London (*k*).

So, also, if a purchaser in the same contract agrees to purchase an estate for a fixed price, and also something else not essential to the enjoyment of the estate, but only a small adjunct of it, and a good title to this adjunct cannot be made, the sale of the estate alone will be enforced; for instance, a contract to buy an estate for £24,000, and the furniture thereon at a valuation (*l*). *Secus*, if the adjunct is essential to the enjoyment of the property, as the fixtures of a public-house (*m*).

Sales by
auction in
lots.

In the case of an estate being sold by auction, after which it is found that a good title cannot be made to some of the lots, specific performance will be decreed, unless the lots as to which the failure occurs are complicated with the others (*n*); but everything depends in such a case upon the nature of the property; for instance, if a farm were sold along with a house for residence thereon, and the title to the house failed, the rest of the contract would not be enforced (*o*).

Effect of
approximate
description.

Where lands are described as of or about a certain acreage, or of a certain acreage "be the same more or less," and there is found to be a considerable discrepancy from the figure named, it appears that, in the absence of an express condition to the contrary, a purchaser may be allowed an abatement even after accepting a convey-

(*i*) *M'Queen v. Farquhar*, 11 Ves.
467.

(*k*) *Peers v. Lambert*, 7 Beav.
546; *Perkins v. Ede*, 16 Beav. 193.

(*l*) *Richardson v. Smith*, 5 Ch.
648.

(*m*) *Darbey v. Whitaker*, 4 Drew.
134.

(*n*) *Poole v. Shergold*, 2 Bro. C. C.
118.

(*o*) *Perkins v. Ede*, *sup.*

ance (*p*). *A fortiori*, if he discovers the error before conveyance, unless it is of trifling extent, he may claim abatement (*q*); nor would the purchaser's intimate acquaintance with the estate relieve the vendor (*r*).

If lands are purchased on the usual condition as to compensation for misdescription, and they prove to exceed the estimate, though the purchaser can enforce performance on paying compensation, the vendor cannot compel him to complete and pay a larger sum than he contracted to pay (*s*).

2. *Where the purchaser seeks specific performance.*

The general rule is that a purchaser may, if he chooses, compel a vendor who has contracted to sell a larger interest in an estate than he has, to convey to him such interest as he is entitled to, with compensation (*t*), and this whether the difference is one of tenure or of quantity (*u*). This has been done even where the difference in quantity amounted to as much as one-half (*x*). Where, however, the title of the vendor is doubtful or defective, it has been held that the purchaser cannot compel a conveyance of such interest as he has (*x*).

Purchasers' suits.

Purchaser can usually claim performance with abatement.

Exceptions.

If the purchaser, at the time of the contract, knows of the limited interest of the vendor, he will not be able to insist upon a conveyance of such interest with compensation (*y*); and the neglect of a purchaser to make proper inquiries may disentitle him from claiming compensation for some defect which, with ordinary care, he might have

Notice.

(*p*) *Palmer v. Johnson*, 13 Q. B. D. 351; 12 *ib.* 32; *Re Turner & Skelton*, 13 Ch. D. 130.

(*q*) *Hill v. Buckley*, 17 Ves. 394; *Winch v. Winchester*, 1 V. & B. 375.

(*r*) *King v. Wilson*, 6 Beav. 124.

(*s*) *Prie v. North*, 2 Y. & C. Ex. 620.

(*t*) *Mortlock v. Buller*, 10 Ves. 315.

(*u*) *Hughes v. Jones*, 3 De G. F. & J. 307; *Wood v. Griffith*, Wilson Ch. Rep. 44; *Leslie v. Crommelin*,

2 I. R. Eq. 134; *Hooper v. Smart*, 18 Eq. 683; *McKenzie v. Hesketh*, 7 Ch. D. 675.

(*v*) *Burrow v. Scammell*, 19 Ch. D. 175; but see *Wheatley v. Slade*, 4 Sim. 126.

(*x*) *Williams v. Higden*, 1 C. P. 500.

(*y*) *Lawrenson v. Butler*, 1 S. & L. 13; *Harnett v. Yeilding*, 2 S. & L. 549; *Castle v. Wilkinson*, 5 Ch. 534.

discovered (*z*), as where a vendor had contracted to sell certain property which the purchaser knew to be in the occupation of a tenant, and it turned out that the tenant had an agreement for a lease (*a*), the occupation being considered to amount to constructive notice of the lease. But it appears that the doctrine of constructive notice is not generally applicable to such cases, and that at least it would not suffice in a vendor's suit (*b*), or in a purchaser's suit to give a title to compensation in respect of the tenant's interest (*c*).

Mistake,
purchaser's
option to
rescind.

Where, however, the statement as to quantity was simply a mistake, and it would be plainly unjust to the vendor to decree specific performance with compensation, the purchaser has been required to elect whether he would perform the contract without compensation, or have his bill dismissed (*d*); in this case there was a difference of nearly one-half in the acreage stated.

Express
stipulation to
contrary.

The right to compensation also may be excluded by express contract, as by a stipulation to that effect contained in the conditions of sale (*e*), unless such a condition may be construed so as to extend only to small accidental inaccuracies (*f*). The right, however, is not excluded by a mere condition that he shall not object to complete the purchase if the quantity should turn out less than was stated in the particulars (*g*); nor by acts on his part which merely amount to a waiver of objections to the title (*h*). It may be excluded by the vendor rescinding the contract under a condition empowering him to do so, if unwilling or unable to make a satisfactory title (*i*); but not if the vendor sold the property under such a condition knowing

(*z*) *Edwards-Wood v. Majoribanks*, 7 H. L. 806.

(*a*) *James v. Lichfield*, 9 Eq. 51.

(*b*) *Caballero v. Henty*, 9 Ch. 447.

(*c*) *Phillips v. Miller*, 10 L. R. C. P. 428.

(*d*) *Earl of Durham v. Legard*, 34 L. J. Ch. N. S. 589.

(*e*) *Cordingley v. Cheeseborough*, 3

Giff. 496.

(*f*) *Whittencore v. W.*, 8 Eq. 603.

(*g*) *Frost v. Brewer*, 3 Jur. 165.

(*h*) *Calcraft v. Roebuck*, 1 Ves. jr. 221.

(*i*) *Mawson v. Fletcher*, 6 Ch. 91; 10 Eq. 213; *Duddell v. Simpson*, 2 Ch. 102.

his title to be defective, or has been guilty of wilful misrepresentation (*k*) ; and, notwithstanding such condition, if the purchaser is willing to waive all objections to the title, he is entitled to take the property without compensation (*l*).

The right to rescind may, moreover, be lost by the vendor's replying to the purchaser's objections or requisitions (*m*), and by acquiescence in, or confirmation of, the contract (*n*). A fuller discussion of the right of a purchaser to repudiate a contract on grounds of mistake and misrepresentation is found in the chapters on Mistake and Fraud (*o*). As to a vendor's right to rescind under a special condition enabling him so to do in case of the purchaser taking any objection to the title which the vendor is unable or unwilling to meet, reference may be made to the recent case of *Re Dames and Wood* (*p*), in which it was held that, after the vendor had elected to rescind, it was not open to the purchaser to waive his objections and insist on the contract. Even under such a condition a mere dispute as to the form of conveyance is not a sufficient ground for rescission (*q*).

Right of
rescission.

(*k*) *Nelthorpe v. Holgate*, 1 Coll. 203; *Price v. Macaulay*, 2 De G. M. & G. 347.

(*l*) *Page v. Adam*, 4 Beav. 269.

(*m*) *Tanner v. Smith*, 10 Sim. 410.

(*n*) *Cole v. Gibbons*, 3 P. Wms. 290; *Attwood v. Small*, 6 Cl. & F.

424.

(*o*) *Supra*, pp. 150, 193.

(*p*) 29 Ch. D. 626; 27 *ib.* 172.

(*q*) *Re Monkton and Gilzean*, 27 Ch. D. 555; *Hardman v. Child*, 28 *ib.* 712.

CHAPTER VII.

INJUNCTIONS.

Injunction
compared
with specific
performance.

IN some respects analogous to the equitable remedy of specific performance is the equally characteristic remedy of injunction. A decree of specific performance, as its name implies, enforces the performance of some specific act. An injunction is the converse of this; it judicially forbids the performance of some specific act or series of acts.

From the nature of the case the remedy of specific performance only applies to cases arising out of contract; since it rarely happens apart from contract that one person has a right to the performance of a particular act on the part of another.

On the contrary, the cases for which injunction is a proper remedy have usually no connexion with contract. There are, indeed, cases in which one person contracts with another not to do a certain act; and such negative contracts may, as we have seen, be specifically enforced by means of injunction (a). But a great majority of the cases in which one person seeks to prohibit a certain act, depend on rights which avail against all the world; or, to use the technical language of jurisprudence, depend on *jura in rem*, not on *obligationes*. As far, however, as regards the remedy, there is little importance in the distinction. Whether the negative duty, or duty to abstain, be contractual or general, the injunction which enforces it is the same in nature and in form.

(a) p. 656. *Lumley v. Wagner*, 1 De G. M. & G. 615.

An injunction may be described as a judicial process whereby a party is required to do a particular thing or to refrain from doing a particular thing. There is, however, a marked contrast between injunctions which command and injunctions which forbid the doing of an act. The former only issue after decree, and are of the nature of an execution to enforce the same. The latter may be either interlocutory or perpetual. Interlocutory injunctions are made pending the hearing of the cause upon the merits, and are generally expressed to continue until such hearing or until further order. Perpetual injunctions are such as form part of the decree made at the hearing upon the merits, and perpetually restrain the defendant from the assertion of a right or the commission of some act contrary to equity: they are in fact final decrees.

Definition.

Interlocutory
or perpetual.

Interlocutory injunctions are merely provisional and do not conclude a right. Their object is to preserve the property subject to litigation *in statu quo* until the hearing or further order, and may be obtained by a plaintiff who shows that he has a fair question to raise as to the existence of the right which he alleges (a).

Though a Court of equity has no jurisdiction in the absence of contract to compel the performance of a positive act, such as the removal of a work already executed, it may, by framing the order in an indirect form, compel a defendant to restore things to their former condition. Such orders are called mandatory injunctions (b). This jurisdiction is, however, only exercised in cases which admit of no other adequate remedy, and their occurrence is unfrequent. This species of relief will always be refused if the injury can be reasonably recompensed by damages, or even if the balance of convenience is strongly on the side of the defendant (c).

Mandatory
injunctions.

(a) See Kerr on Injunctions, pp. 11, 12, ed. 2.

(b) Kerr Inj. p. 50.

(c) *Deere v. Guest*, 1 My. & C. 516; *Jacomb v. Knight*, 3 De G. J. & S. 538.

Origin of the jurisdiction.

The jurisdiction of equity to decree injunctions arose, like that of specific performance, from the want of an adequate remedy at law. The common law had, indeed, in certain cases, the power of prohibiting the committal of wrongs; for instance, waste could be restrained by the writ of prohibition and estrepment of waste. But the cases in which the common law supplied remedies of this nature were very few, and the procedure by which they were applied was cumbrous and inconvenient, so that the assistance of equity was at an early period found necessary for the proper administration of justice; and when this jurisdiction was established, the superiority of its process gradually caused the inferior remedies of law to fall into desuetude.

Classification of injunctions.

The following is in substance the enumeration given by a learned author of the circumstances in which the remedy of injunction has been most commonly applied (*d*).

1. To stay proceedings in Courts of law.
2. To restrain the indorsement or negotiation of negotiable instruments, the sale of land, the sailing of a ship, the transfer of stock or the alienation of a specific chattel.
3. To prevent the wasting of assets or other property pending litigation.
4. To restrain trustees from assigning or improperly dealing with the legal estate or trust property.
5. To prevent the removing out of the jurisdiction, marrying, or having any intercourse which the Court disapproves of, with a ward.
6. To restrain the commission of every species of waste.
7. To prevent the infringement of patents and the violation of copyright.
8. To prevent the continuance of public or private nuisances.
9. To prevent multiplicity of suits and vexatious litigation.

(*d*) Eden on Injunctions, p. 1.

It will be observed that this enumeration admits of a division into two strongly distinguished classes of cases; first, those in which the wrong restrained is one which is regarded as such in equity only, and in which, accordingly, the ground of the jurisdiction is the absence of a legal remedy altogether; secondly, those in which the wrong restrained is both legal and equitable, in which, therefore, the ground of the jurisdiction is the superiority of the equitable to the legal remedy.

The former class comprises,—first, injunctions which are designed to prevent the abuse of legal processes, under circumstances which render it inequitable to apply them; secondly, injunctions protecting equitable estates and interests not recognized at law.

Injunctions
against equitable
wrongs.

The latter class includes,—first, injunctions protecting common rights as to the enjoyment of land; secondly, injunctions protecting the peculiar rights arising from patents, copyright, and the use of trade marks.

Injunctions
against legal
wrongs.

The enumeration above quoted does not indeed pretend to be exhaustive; nor is it possible to specify every case to which the remedy of injunction might be applied. Wherever a plaintiff is equitably entitled *in rem* or *in personam* to restrain the commission or continuance of an act, he may be aided by means of injunction. The cases here given copiously illustrate the circumstances in which the remedy is most usually sought; and whatever other cases may suggest themselves will be found to fall easily within one or other of the classes indicated.

SECTION I.—INJUNCTIONS RESTRAINING WRONGS PURELY EQUITABLE.

I. *To prevent the abuse of Legal Processes.*
Earl of Oxford's Case.

II. *To protect Equitable Estates and Interests.*

I. *Injunctions to prevent the abuse of Legal Processes.*

The most important class of cases falling under this description is that of which one of the oldest, and most famous of authorities is—

THE EARL OF OXFORD'S CASE

[1 Ch. Rep. 1; 2 Wh. & T. L. C. 590].

This case is celebrated in history on account of the warm dispute which arose therefrom between Lord Chancellor Ellesmere and Lord Chief Justice Coke. The former insisted on the right and jurisdiction of equity to restrain persons who had obtained judgments at law from making such judgments instruments of injustice. He did not pretend to a power to overrule the judgment, but merely to prevent the party obtaining it from acting upon it contrary to conscience. The latter, however, considered the exercise of this power as an encroachment upon the jurisdiction of the Courts of common law. So far did the contention go that indictments were preferred at Coke's instigation against the parties who had filed their bill in Chancery, their counsel and solicitors; and, on the other hand, the Attorney-General was directed to prosecute in the Star Chamber those who had preferred the indictments.

In the event the jurisdiction of equity contended for was firmly established. And reasonably so, for it consisted not in any assumption of superiority to the Courts

of law, but in the assertion of a right to control the acts of the parties concerned, according to principles of conscience and equity.

The recent history of this head of equitable jurisdiction shows by what steps it has come to be at present of very small effect and importance, compared with what it formerly had.

1. First, by the Common Law Procedure Act, 1854 (*e*), C. L. P. Act, 1854. it was enacted (*f*) that equitable pleas and replications might be made use of at law. The effect of this might have been to have rendered the interference of equity on behalf of the defendant at law in the future unnecessary. But this effect was prevented by the narrow construction put upon the Act by the common law judges, who held that no equitable plea was good unless it disclosed facts which would entitle the defendant to a perpetual and unconditional injunction in equity (*g*). Thus in a multitude of cases applications to the Court of Chancery continued to be necessary. Moreover, the Act only gave an option to the defendant at law to plead an equitable defence; it still left him the *power* of proceeding in equity for an injunction as before (*h*).

2. By the Judicature Acts, 1873 and 1875 (*i*), the principal previously existing Courts of law and equity were consolidated into the Supreme Court of Judicature, consisting of Her Majesty's High Court of Justice and Her Majesty's Court of Appeal; and it was enacted that in every division thereof law and equity should be concurrently administered. Further, by s. 24, sub-s. 5, of the Act of 1873, it is enacted that "no cause or proceeding at any time pending in the High Court of Justice or before the Court of Appeal shall be restrained by prohibition or injunction; but every matter of equity on

(*e*) 17 & 18 Vict. c. 125.

(*f*) s. 83.

(*g*) *Jeffs v. Day*, L. R. 1 Q. B. 374.

(*h*) *Gompertz v. Pooley*, 4 Drew. 453.

(*i*) 36 & 37 Vict. c. 66, and 38 & 39 Vict. c. 77.

“ which an injunction against the prosecution of any such
 “ cause or proceeding might have been obtained if this
 “ Act had not passed, either unconditionally or on any
 “ terms or conditions, may be relied on by way of defence
 “ thereto : Provided always, that nothing in this Act con-
 “ tained shall disable either of the said Courts from
 “ directing a stay of proceedings in any cause or matter
 “ pending before it if it shall think fit ; and any person,
 “ whether a party or not to any such cause or matter, who
 “ would have been entitled if this Act had not passed, to
 “ apply to any Court to restrain the prosecution thereof,
 “ or who may be entitled to enforce by attachment or
 “ otherwise any judgment, decree, rule, or order contrary
 “ to which all or any part of the proceedings in such cause
 “ or matter may have been taken, shall be at liberty to
 “ apply to the said Courts respectively, by motion in a
 “ summary way, for a stay of proceedings in such cause or
 “ matter, either generally, or so far as may be necessary
 “ for the purposes of justice ; and the Court shall there-
 “ upon make such order as shall be just.”

Effect of
legislation.

The result of this legislation is to put a stop in general to injunctions against judicial proceedings ; providing instead thereof a power for any division of the High Court to order a stay of its own proceedings, and in applications for this purpose to consider and give weight to those principles of equity which were previously invoked for the purpose of obtaining an injunction.

Cases not
within the
Acts.

3. Still, there are cases not affected by the Judicature Act in which this equitable procedure may still be appealed to ; and it is therefore not idle to consider the principles by which it was and may be still directed.

In the first place, it is to be observed that the old jurisdiction remains in force as regards proceedings in all Courts not comprised by the Judicature Acts in the High Court of Justice.

Suits in fo-
reign Courts
restrained.

Thus, the Chancery Division may restrain a person within its jurisdiction from taking proceedings in Courts

out of its jurisdiction—for instance, in Scotland, Ireland, the colonies, or in foreign countries. But no more in these cases than formerly in granting injunctions against proceedings in the ordinary Courts of law does equity affect to control, or overrule, or examine, the judicial or administrative action of the foreign tribunals. It addresses its decree to the person within its jurisdiction, forbidding his action (*k*).

Again, there are certain Courts in England which were not affected by the Judicature Act, and which, therefore, continue to be ruled by the old principles and procedure. One instance of this is the Lord Mayor's Court in London; and if from any circumstances it were inequitable that a person should take or continue proceedings therein, there seems no reason why he should not as formerly be restrained by a Court of equity (*l*). Other local Courts in England fall within the same principle (*m*).

And in English Courts not affected by the Acts.

4. The Court of Bankruptcy, which was not affected by the Judicature Act, is now incorporated in the High Court of Justice (*n*), and consequently its former power of restraining actions in other Courts no longer exists (*o*).

Court of Bankruptcy.

5. There being, therefore, cases in which injunctions against legal proceedings may still be sought in equity, it is not immaterial to inquire into the circumstances which will be deemed to warrant such application; especially since, in cases in which an injunction is no longer the proper remedy, the same circumstances which formerly warranted it will now entitle a defendant to a stay of proceedings.

In what circumstances granted.

Lord Ellesmere in the principal case gave certain illustrations of the circumstances in which the Court had interfered to stay proceedings at law, on the grounds of some equity of which the defendant could not avail him-

(*k*) *Portarlington v. Soulby*, 3 My. & K. 106; *Hope v. Carnegie*, 1 Ch. 320.

(*l*) *Mildred v. Neate*, 1 Dick. 279; *Cottesworth v. Stephens*, 4 Ha. 185.

(*m*) *Hedley v. Bates*, 13 Ch. D. 498; *Stannard v. St. Giles' Vestry*, 20 *ib.* 190.

(*n*) 46 & 47 Vict. c. 52, s. 93.

(*o*) *Re Barnett*, 15 Q. B. D. 169.

self in a Court of law, but to which he might appeal as a suppliant in Chancery. The following heads have been specified as comprising the various grounds on which such interference of equity might be sought:—accident, mistake, fraud, accounts, illegal and immoral contracts, penalties and forfeitures, breaches of covenants, administration of assets, marshalling of securities and suretyship (*p*). The distinction between equitable and legal doctrines and practice as to these matters have already been expounded under the various headings of this work, and of course need not now be particularly referred to. It suffices to adduce a few illustrations of the operation of the jurisdiction in the cases in which it still applies, at the same time contrasting it with the procedure by which in other cases the same result is now reached.

Equitable
title required.

First, however, we may premise that it was always necessary for a plaintiff seeking an injunction against legal proceedings to establish some special *equitable* title to relief—the remedy was not given on the ground of matter which might be alleged in defence at law (*q*); and thus the amendment of the law effected by the Common Law Procedure Act, 1854, already quoted, reduced the number of cases in which the remedy of injunction was available (*r*).

Mere error at
law not
sufficient.

Moreover, the principle of injunctions cannot be so applied as to amount in effect to an appeal from a Court of law. An injunction will never be granted against the execution of a judgment on the mere ground of its being a decision erroneous at law (*s*). Still less where the result has been produced by the negligence of the party seeking relief (*t*). The illustrations adduced will show the nature of the special equitable claims which form proper grounds for seeking the remedy.

(*p*) Edén on Injunctions, 4; Joyce on Injunctions, 1053, 1257.

(*q*) *Harrison v. Nettleship*, 2 My. & K. 423.

(*r*) *Farebrother v. Welchman*, 3 Drew. 122, and cf. *Gompertz v. Pooley*,

4 Drew. 453.

(*s*) *Simpson v. Howden*, 3 My. & Cr. 108.

(*t*) *Bateman v. Willoe*, 1 S. & L. 204.

6. Perhaps there is no class of actions in which the remedy of injunction has been so frequently applied as in those of creditors against the legal personal representatives of deceased persons.

In some of such cases the injunction is sought and granted for the protection of the executor or administrator. At law, when the legal personal representative had once acquired possession of or become chargeable with sufficient property of the deceased to discharge his debts, he remained chargeable, notwithstanding any accident, such as robbery or fire, which might destroy the property before its distribution; and it mattered not how free from default he may have been, or how great the liability thus devolving upon him personally. But in equity the hardship and injustice of a creditor's action under such circumstances was recognized; and on the application of the executor or administrator, a Court of equity would issue an injunction forbidding the creditor to continue his proceedings at law (*u*).

Executors and administrators protected.

Under the present practice, the Courts of law would themselves stay proceedings under circumstances formerly warranting an injunction, and might direct the transfer of the action to the Chancery Division.

Stay of proceedings.

7. In another class of cases an injunction was obtainable for the protection of the general creditors. We have elsewhere seen that executors had at law large powers of preference with regard to the payment of the debts of their testator. To prevent the unfair exercise of this preference, Courts of equity encouraged suits for the general administration of estates, in which their decrees differed from a judgment at law in that they were equally in favour of all creditors. After the granting of such a decree, equity was wont to restrain all actions brought by individual creditors at law (*x*). But it would not interfere with a creditor who

General creditors protected.

(*u*) *Crosse v. Smith*, 7 East, 258; *Croft v. Lyndsey*, Freem. 1.

(*x*) *Morrice v. B. of England*, Cal. Talb. 217; 4 Bro. P. C. 287; *Rush v. Higgs*, 4 Ves. 638.

had obtained a judgment at law prior to the administration decree (*y*).

Present
practice.

Under the present practice, a Court of law would stay proceedings in such an action (*z*), and the judge in whose Court the administration action is pending has power, without any further consent, to order the transfer to himself of any action pending in any other division of the Court brought by or against the executors or administrators whose assets are being administered (*a*).

Injunctions in
winding-up.

Similar to these cases were those in which actions at law were commenced against a company after proceedings had been taken in equity for its winding-up. These cases are now also provided for by the rule of Court above referred to.

Arbitration.

The Court has no jurisdiction to restrain a party from proceeding with an arbitration, whether the source of the objection is that the matter referred is beyond the scope of the agreement to refer (*b*) or that the party is proceeding without authority in the name of another (*c*).

Equitable
defences
against legal
instruments.

8. Other illustrations of the granting of similar injunctions are afforded by cases in which instruments legally binding have been obtained by such actual or constructive fraud as confers an equitable title to relief against them. Such matters can now, of course, be pleaded in defence in any division of the Court; formerly the relief took the form of an injunction restraining legal proceedings on the instrument (*d*).

Trust estates
protected.

9. Where, again, the legal and equitable titles to property were in different people, an action at law by the person having the legal estate was restrained by injunction. Thus separate estate limited to a married woman without

(*y*) *Haly v. Barry*, 3 Ch. 452; *Etheridge v. Womersley*, 29 Ch. D. 557.

(*z*) *Crowle v. Russell*, 4 C. P. D. 186.

(*a*) Order XLIX., rule 5 (1883).

(*b*) *North London R. Co. v. G. N.*

R. Co., 11 Q. B. D. 30.

(*c*) *Lond. & Blackwall R. Co. v. Cross*, 31 Ch. D. 354; but see and distinguish *G. W. R. Co. v. W. & L. R. Co.*, 17 Ch. D. 493.

(*d*) *Lloyd v. Clark*, 6 Beav. 309; *Tyler v. Yates*, 11 Eq. 265.

the intervention of trustees, was protected against the judgment creditors of her husband by this means. The creditors, indeed, obtained a legal title through the husband; but he being in equity a trustee, their execution was restrained by injunction (*e*).

10. The desire to avoid multiplicity of actions was also a frequent ground of injunctions to stay proceedings. A party was never suffered to sue for the same thing at the same time in equity and at law. When litigation was pending in one Court in which complete relief could be had, and it was sought to institute proceedings elsewhere, the person so attempting was restrained by injunction (*f*); *a fortiori* if the design of the foreign proceedings was to gain some unfair advantage, as where a creditor who had a specific charge upon a part of the testator's real estate came in under a decree in a general administration suit, and then claimed to prove in a creditors' suit which he had instituted in Ireland (*g*).

Injunctions
against multi-
plicity of
actions.

11. In the case of foreign suits, even though no decree has been obtained in this country, yet if a suit instituted abroad appears ill-calculated to answer the ends of justice, it may be restrained (*h*). And where there has been no question as to the necessity of the foreign litigation, a person within the jurisdiction of the Court of Chancery has been restrained from proceedings which are deemed by it contrary to good conscience, such as a suit to recover a gambling debt (*i*).

Foreign suits,
when re-
strained.

The fact of a foreigner having property in this country enables the Court to make effectual an injunction issued against him (*k*).

On the contrary, where such interposition would not

(*e*) *Newlands v. Paynter*, 4 My. & Cr. 408.

(*f*) *Carron, &c. Co. v. Maclaren*, 5 H. L. 416, 437; *Harrison v. Gurney*, 2 J. & W. 563.

(*g*) *Beauchamp v. Huntley, Jac.* 546.

(*h*) *Baillie v. B.*, 5 Eq. 175.

(*i*) *Portarlington v. Soulby*, 3 My. & K. 104; *Simpson v. Fogo*, 1 J. & H. 18; 1 H. & M. 195.

(*k*) *Carron, &c. Co. v. Maclaren*, *sup.*

tend to equality of all parties, or where it would not add to the convenience of proceeding, it will not be granted (*l*).

When a foreigner seeks no assistance from the Courts of this country, it requires a very strong case to induce them to restrain him, when domiciled in another country, from proceeding to obtain payment of his debts according to the law of that country (*m*).

Application
for Acts of
Parliament.

12. Analogous in principle to the restraining of proceedings in Courts of justice are those in which application has been made to the Court of Chancery against a party applying for a private Act of Parliament, or for an Act respecting property. It has been laid down by many judges that the Court, acting *in personam*, has power to grant such an injunction, though there is no case in which it has been actually carried into effect. In *Heathcote v. N. S. R. Co.* (*n*) an injunction was granted by Sir L. Shadwell, but was dissolved by Lord Cottenham on appeal, not indeed on the general ground of want of jurisdiction, but from the absence in that case of circumstances warranting such a decree. His lordship pointed out an important distinction between such a case and an injunction against proceedings at law, the ground of the latter being that it was sought to interfere with an inequitable use of a legal right, while in the former case, it was the ordinary province of the legislature to abrogate existing rights and create new ones. To hold, therefore, that no application should be made to Parliament because its object was to interfere with some right or interest, would be in effect to hold that the Court should by its injunction deprive the subject of the benefit of parliamentary interference. An injunction, therefore, could not be granted on the ground that the Act of Parliament sought for would interfere with existing rights, it being the very object of it to do so.

(*l*) *Liverpool, &c. Co. v. Hunter*, 4 Eq. 62; 3 Ch. 479; *Jones v. Geddes*, 1 Ph. 725.

(*m*) *Carron, &c. Co. v. Maclaren*, 5 H. L. 416.
(*n*) 2 Mac. & G. 100.

Upon the same principle, in the absence of some special equity, the Court will not restrain an application to the legislature of a foreign country (*o*).

As, however, it is unlawful, and in fact a breach of trust, to apply the funds of a company in an application to Parliament for powers to extend the business of the company beyond the objects for which it was constituted, the Court has power, at the suit of any of the shareholders, to interfere by injunction to restrain such application (*p*). The funds of a company may, however, be employed in defence of existing rights, and if it be necessary to apply to Parliament for their protection, such application will not be restrained (*q*).

When restrained.

13. Courts of equity have always been careful to protect their own officers in the execution of the processes of the Court against any actions brought against them for acts done in pursuance of their duty. If the processes were irregular, they were not to be examined in other Courts; the Courts of equity would themselves apply the proper remedy (*r*).

Equity protects its own officers.

14. It may be laid down as a general principle, that a Court of equity neither has nor had any jurisdiction to restrain by injunction any criminal proceedings (*s*). It was but an apparent exception that when the person instituting such proceedings was at the same time himself a plaintiff in equity, the Court had power to require him to elect between his suit in equity and his prosecution (*t*); and this case has recently been disapproved of by high authority (*u*). Under s. 85 of the Companies Act, 1862,

Criminal proceedings not restrained.

(*o*) *Bill v. Sierra, &c. Co.*, 1 De G. F. & J. 177.

(*p*) *Simpson v. Denison*, 10 Ha. 51; see also *G. W. R. Co. v. Rushout*, 5 De G. & Sm. 290.

(*q*) *Bright v. North*, 2 Ph. 216.

(*r*) *May v. Hook*, 2 Dick. 619, cited; *Walker v. Micklethwait*, 1

Dr. & Sm. 49.

(*s*) *Montague v. Dodman*, 2 Ves. sr. 396.

(*t*) *M. of York v. Pilkington*, 2 Atk. 302.

(*u*) *Saull v. Browne*, 10 Ch. 64; *Kerr v. Corp. of Preston*, 6 Ch. D. 463.

the Court has, after the presentation of a petition for winding-up, restrained criminal proceedings against the company (*x*).

II. *Injunctions protecting Equitable Estates and Interests not recognized at Law.*

Trust property protected.

1. Trusts supply the most extensive and important class of purely equitable estates. An illustration which falls with equal propriety under this head has been already given of the protection of trust property by means of injunction (*y*). Other instances of a similar nature may be easily supplied; for example, where a trustee seeks payment to himself of a legacy bequeathed to his *cestui que trust* (*z*). So where a *cestui que trust* proves a probable intention on the part of his trustee to commit a breach of trust, he may procure an injunction to restrain him (*a*); and it is not necessary to entitle him to this relief that the threatened damage should be irreparable (*b*). It is the right and duty of a trustee who apprehends a breach of trust by his co-trustee to seek an injunction to restrain him (*c*).

Breach of trust restrained.

Liens protected.

2. Thus again, the lien of a purchaser has been protected by an injunction restraining the vendor from parting with the legal estate (*d*); and, similarly, the interest of an equitable mortgagee (*e*). Constructive trusts arising from frauds have also been assisted by restraining the indorsement or negotiation of notes fraudulently obtained (*f*).

Constructive trusts.

(*x*) *Re Briton Medical and General Co.*, 32 Ch. D. 503.

(*y*) *Newlands v. Paynter*, 4 My. & Cr. 408.

(*z*) *Hill v. Turner*, 1 Atk. 516.

(*a*) *Balls v. Strutt*, 1 Ha. 146.

(*b*) *Anon.*, 6 Mad. 10; *Dance v.*

Goldingham, 8 Ch. 902.

(*c*) *Re Chertsey Market*, 6 Pri. 279.

(*d*) *Echliiff v. Baldwin*, 16 Ves. 267.

(*e*) *Lond. & County Bk. v. Lewis*, 21 Ch. D. 490.

(*f*) *Smith v. Aykewell*, 3 Atk. 566.

3. We have seen elsewhere (p. 420) that the unauthorised marriage or removal of wards of Court will be prohibited by injunction; a guardian may even be restrained from giving his consent to such a marriage without the leave of the Court (*g*); and, by an analogous jurisdiction, fathers have for special reasons been restrained from taking their children abroad, or interfering with their education (*h*).

Improper
dealing
with wards of
Court.

(*g*) *Beard v. Travers*, 1 Ves. 313. 101; *De Manneville v. De M.*, 10
(*h*) *Exp. Warner*, 4 Bro. C. C. Ves. 52.

SECTION II.—INJUNCTIONS RESTRAINING WRONGS AT ONCE LEGAL AND EQUITABLE.

General Principles.

I. *Injunctions protecting Rights in Land.*

1. *Waste.*

(1.) *Doctrines and remedies of Law as to waste.*

(2.) *Doctrines and remedies of Equity as to waste.*

Garth *v.* Cotton.

2. *Trespass.*

3. *Nuisances.*

II. *Injunctions protecting Patent Rights, &c.*

1. *Patents.*

Hill *v.* Thompson.

2. *Copyright.*

3. *Trade marks.*

Principles of
the jurisdic-
tion.

The protection of legal rights to property from irreparable, or at least from serious damage, pending the trial of the legal right, is part of the original and proper office of a Court of equity (*i*). It has sometimes been quoted as a maxim that *equity will not suffer a wrong without a remedy*. A full discussion, therefore, of the cases in which the protection of an injunction might be afforded would require an exposition of legal rights generally, which cannot, of course, be here attempted. It must suffice, first, to indicate the general principles by which the exercise of the jurisdiction is directed, and secondly, to pass in review, by way of illustration, some of the most frequently occurring and important cases in which this particular remedy is applied.

(i) Kerr, *Inj.* 13; *Hilton v. Granville*, Cr. & Ph. 283, 292.

(1.) A plaintiff seeking in equity an injunction for the protection of a legal right, must first show a fair *prima facie* case in support of the title which he asserts (*k*). It is not necessary for him to show a clear legal title, but he must satisfy the Court that he has a fair question to raise as to the existence of the legal right which he sets up (*l*).

Plaintiff must show *prima facie* right,

(2.) He must also show that there are substantial grounds for doubting the existence of the right asserted by the defendant whom he seeks to restrain (*m*); or, if his legal right is not disputed, he must show that the act complained of is in fact a violation of his right (*n*), and that there is a real probability or danger of his right being invaded. On the one hand, the mere apprehension of injury is not sufficient (*o*); on the other, the mere denial by the defendant of his intention to infringe the plaintiff's right will not necessarily prevent the Court from interfering (*p*). It suffices if the Court is satisfied that an infringement is threatened or is imminent (*q*).

and that defendant's right is doubtful, or his act is injurious,

(3.) Thirdly, the plaintiff must show that the mischief which he seeks to restrain will be such as to be incapable of reparation by any legal remedy. It must be such as that a mere payment of damages will not suffice to put the parties in their original position (*r*). This may be the case either because the act threatened would destroy the subject-matter of dispute (*s*), or because the nature of the act renders it impossible to accurately ascertain the damage (*t*).

and that the legal remedy is insufficient.

On these general conditions rests the jurisdiction to grant

(*k*) *Ibid.*; *Saunders v. Smith*, 3 My. & Cr. 714, 728.

(*l*) *Shrewsbury & Chester R. Co. v. Shrewsbury & Birmingham R. Co.*, 1 Sim. N. S. 410, 426.

(*m*) *Sparrow v. O. W. & W. R. Co.*, 9 Ha. 436, 441.

(*n*) *Ripon v. Hobart*, 3 My. & K. 169, 176; *Haines v. Taylor*, 10 Beav. 471; 2 Ph. 209.

(*o*) *Hanson v. Gardiner*, 7 Ves. 307.

(*p*) *Jackson v. Cator*, 5 Ves. 688.

(*q*) *Gibson v. Smith*, 2 Atk. 182.

(*r*) *Wood v. Sutcliffe*, 2 Sim. N. S. 165.

(*s*) *Hilton v. Granville*, Cr. & Ph. 283, 292.

(*t*) *Att.-Gen. v. Aspinall*, 2 My. & Cr. 613.

an injunction for the protection of a legal right. The detailed considerations which affect it will best be seen under the headings which particularly illustrate its application. These fall under one or other of two classes, of which the first comprises common law rights respecting the enjoyment of land or houses; the second, the somewhat peculiar class of rights which arise from patents, copyright, and the use of trade marks.

Jud. Act,
s. 25, sub-s. 8.

It should be observed that by the Judicature Act it is enacted that, "a mandamus or an injunction may be granted by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such an order should be made" (*u*).

On these words it has been argued that the principles on which the Courts proceeded in granting injunctions were thereby extended, and in many cases it has been sought to secure the assistance of this remedy in circumstances under which, before the acts, it would have been admittedly refused. It has, however, been clearly established that the principles which move the Court in granting injunctions have not been extended by the Act. No more than before will it interfere in cases where no legal injury has been effected or threatened. Typical cases of this kind are found in *Day v. Brownrigg* (*x*), where an injunction was sought to restrain the defendant from giving a name to his house which might confuse it with a neighbouring house, and in *Street v. Union Bank of Spain* (*y*), in which an injunction was sought to restrain the use of a cypher address. In both cases the remedy was refused, on the ground that it was but an *inconvenience*, not a legal injury, which was threatened (*z*).

(*u*) 36 & 37 Vict. c. 66, s. 25,
sub-s. 8.

(*x*) 10 Ch. D. 294.

(*y*) 30 Ch. D. 156.

(*z*) And see *North Lond. R. Co. v. G. N. R. Co.*, 11 Q. B. D. 30.

I. *Injunctions protecting Rights in Land.*1. **Injunctions against waste.**

Some of the most important cases in which equity assists the law by applying its special processes for the protection of legal rights are supplied by questions respecting waste. There are indeed cases of waste in which the wrong redressed is simply equitable, and which would, therefore, more strictly fall under the preceding heading. But it will be more convenient to treat together the various matters concerning waste which call for comment; and in doing so, the distinctions between legal and equitable waste will be plainly indicated. The principles of equity respecting waste will most clearly appear if we first review those of law on the same subject.

(1.) *The doctrines and remedies of law as to waste.*

Waste at law has been defined as “any spoil or destruction done, or allowed to be done, to houses, woods, lands, or other corporeal hereditaments by the tenant thereof, during the continuance of his particular estate” (a). Definition.

(a.) *Against whom chargeable.*

Waste, as distinguished from trespass, could only be committed by a limited owner, that is, a tenant for life, or for years, in dower or in curtesy, and it could only be charged against him by one between whom and himself there was privity of estate. Tenant for life.

A tenant in tail after possibility of issue extinct, although practically a tenant for life, was not within the legal restrictions as to waste; he was regarded as having an inheritance (b), but a person to whom he conveyed his estate was treated only as tenant for life (c). Tenant in tail not liable.

These legal restrictions from waste have no application when the instrument giving rise to the life or limited Legal waste allowed.

(a) 3 Steph. Com. 405, 7th ed.

(c) *George Ap-Rice's Case*, 3 Leon.(b) *Williams v. W.*, 15 Ves. 419. 241.

tenancy contains with respect thereto the common clause "without impeachment of waste," or its equivalent. Then, he may fell timber, or open quarries or mines, and will be entitled to the full produce (*d*). In the presence of these words, the Courts of law possessed no restraining power, and had no further jurisdiction.

(b.) *What acts amount to waste at law.*

Felling
timber.

i. Timber trees (oak, ash and elm) being part of the inheritance, it is waste to fell or lop them, or do any act whereby they might decay. A tenant is allowed to cut down trees under twenty years old for the purpose of allowing the proper development and growth of other timber in the same wood and plantation; that is improvement rather than waste (*e*). The tenant for life of a timber estate, *i. e.*, an estate cultivated merely for the produce of saleable timber, and where timber is cut periodically, may fell it in the ordinary course. To do so is a mode of cultivation, and timber felled in proper course constitutes the annual fruit of such land, such as the settlor of the land would expect the successive tenants to receive. He may also cut underwood and willows in due course (*f*), and all trees other than timber trees (*g*).

It is provided by the Settled Land Act, 1882, that where a tenant for life is impeachable for waste in respect of timber, and there is on the settled estate timber ripe for cutting, the tenant for life may, with the consent of the trustees, or by obtaining an order of the Court, cut and sell such timber; on such sale, three-fourths of the proceeds are to be set aside as capital money, and one-fourth is applied as income (*h*).

Opening new
pits or mines.

ii. A tenant for life commits waste by digging pits for gravel, lime, clay, stone, &c. (except for repairs), or by

(*d*) *Lewis Bowles' Case*, 11 Rep. 83.

(*e*) *Honywood v. H.*, 18 Eq. 310; *Lowndes v. Norton*, 6 Ch. D. 139.

(*f*) *Hampton v. Hodges*, 8 Ves. 105; *Phillips v. Smith*, 14 M. & W. 589.

(*g*) *Honywood v. H.*, *sup.*

(*h*) 45 & 46 Vict. c. 38, s. 35.

opening new mines for metal, coal, &c (*i*); but he may continue working pits and mines previously opened, and in order to do so may make new pits or shafts (*k*).

(c.) *Remedies at law.*

The remedies for waste at law were by writ of waste (abolished by 3 & 4 Will. 4, c. 27, s. 36), by an action for damages, by trover for trees, &c., which became the property of the next owner of the inheritance as soon as they were felled, or by action for money had and received for the produce of their sale (*l*).

Writ of waste.

The incompleteness or inadequacy of these remedies is very apparent. They only contemplate the recovery of damages after the waste has been committed, and previous to 17 & 18 Vict. c. 125, Courts of law had no power to prevent by injunction the commission of the waste. Again, Courts of law had no efficient machinery for the taking of accounts, which were often long and complicated. Further, they supplied no remedy at all for many cases of legal waste, as will be more fully seen when considering the nature of the equitable jurisdiction. And lastly, they took no cognizance whatever of what is termed equitable waste.

Inadequacy of the remedy.

Of course the contrast thus suggested between law and equity is now a matter of history. By the Judicature Act, 1873 (*m*), it is enacted that, "An estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate." Though tenants for years and tenants in tail after possibility of issue extinct are not here mentioned, they are brought within the same rule by sub-s. 11, which enacts

(*i*) Co. Litt. 53 b.; *Viner v. Vaughan*, 2 Beav. 466.

521.

(*k*) *Glavering v. C.*, 2 P. Wms. 388; *Elias v. Griffith*, 8 Ch. D.

(*l*) *Seagram v. Knight*, 2 Ch. 632.

(*m*) 36 & 37 Vict. c. 66, s. 25, sub-s. 3.

that in case of a conflict between law and equity the rules of equity shall prevail.

(2.) *The doctrines and remedies of equity as to waste.*

Contrast of
law and
equity.

The contrast between the doctrines of equity and those of law with respect to waste is twofold. In the first place, it consists in the more extended meaning which equity ascribes to the word, reckoning, as it does, many acts as waste which the law did not consider chargeable. Secondly, equity affords a remedy to many persons to whom law would not have allowed a *locus standi*. Its jurisdiction, therefore, in cases of waste depends partly upon the nature of the act complained of, partly upon the position of the parties.

(a.) *As to the nature of the act charged.*

The consideration of the jurisdiction which particularly depends on the nature of the waste complained of, requires a definition of equitable waste.

Equitable
waste defined.

Though equity follows the law in allowing weight to the words "without impeachment of waste," or their equivalent, when used respecting a limited tenancy, it does so only to a certain degree. When they are used it will not restrain from the committing of ordinary waste, such as cutting timber trees and opening mines; but it will not allow this power to be exercised contrary to conscience and in an unreasonable manner, so as to amount in fact to a destruction of the estate settled (*n*).

Instances of
equitable
waste.

The following acts of waste, with which in tenancies "without impeachment of waste" the law would not have interfered, have been deemed unconscionable and unreasonable in equity, and constitute, therefore, equitable waste:—

Destroying
mansion
house.

i. The destruction or dismantling of the mansion house (*o*), and the wanton pulling down of farmhouses on the property (*p*). If, however, such destruction has

(*n*) *Vane v. Barnard*, 2 Vern. 78.

(*p*) *Aston v. A.*, 1 Ves. sr. 265.

(*o*) *Lord Barnard's Case*, *ibid*.

been simply for the purpose of erecting houses of a better kind or in more favourable situations, the tenant incurs no liability to account (*q*).

ii. Though equity allows the ordinary and reasonable cutting of timber, it will interfere if a tenant threatens to strip the estate thereof, or to grub up a wood settled, or make any such extravagant misuse of the power (*r*). Stripping estate of timber.

iii. Similarly, it will not allow the felling of timber planted or left standing for the shelter or ornament of a mansion house or grounds (*s*), even if planted by the tenant himself (*t*). In applying this restriction equity will not criticise the designs of the settlor: his taste as well as his will binds his successors (*u*). The principle extends also to ornaments of outhouses and grounds, plantations, vistas, avenues, and to all the rides for ten miles round (*u*); but not necessarily so as to prevent the cutting for repairs of woods through which such rides pass (*u*). Felling ornamental timber.

iv. The Court will prevent the cutting of saplings not proper to be felled (*r*), and of underwood before it is of sufficient growth (*x*), but not the felling of timber merely because it is not full grown or proper for building (*y*). Cutting saplings.

v. Analogous to the wanton destruction of timber is the improvident or destructive working of mines, from which a tenant for life may be restrained, though not impeachable for waste. Improvident mining.

vi. It is now settled that the Court will not usually interfere to prevent or remedy permissive waste, that is to say, waste occasioned not by act, but by omission, as by suffering houses to fall into decay for want of repairs (*z*); but an account would be directed where there was an Permissive waste.

(*q*) *Morris v. M.*, 3 De G. & J. 323.

(*r*) *Talbot v. Hope-Scott*, 4 K. & J. 96; *Abraham v. Bubb*, 2 Freem. 54.

(*s*) *Rolt v. Somerville*, 2 Eq. Ca. Ab. 759.

(*t*) *Coffin v. C.*, Jac. 71.

(*u*) *M. of Downshire v. Sandys*, 6 Ves. 110.

(*v*) *O'Brien v. O'B.*, Amb. 107.

(*x*) *Brydges v. Stevens*, 6 Madd. 279.

(*y*) *Aston v. A.*, *sup.*

(*z*) *Powys v. Blagrove*, Kay, 495; 4 De G. M. & G. 448.

express covenant to repair (a). There seems, however, to have been a legal liability for such waste (b).

An interference with property is technically "waste," although its effect may be to improve the property. To such the term "ameliorating waste" has been applied; and the exercise of the remedy of injunction being discretionary, the Court has refused to interfere in cases of this kind (c).

(b.) *By and against whom waste may be charged.*

The next inquiry is as to those cases in which the jurisdiction of equity arises from the position of the parties concerned being such as to leave no remedy at law.

Tenant in tail
after possi-
bility of issue
extinct.

i. A tenant in tail after possibility of issue extinct, although unimpeachable of waste at law, is within the principle of equitable waste, and will be restrained in equity from committing malicious and extravagant waste, such as pulling down houses, and the other acts above mentioned (d). But equity will not, any more than law, interfere with an ordinary tenant in tail, who may at his unrestrained pleasure commit any degree of waste, and this notwithstanding that he is restrained by statute from barring his issue or those in remainder, with reversion to the Crown (e).

Tenant in tail
not account-
able gene-
rally.

ii. A mortgagee in fee in possession may at present be restrained from committing waste, as by cutting timber, unless the security be insufficient; and if so, the money arising by sale of the timber or otherwise from the waste must be applied to sink the principal and interest of the debt (f).

Mortgagee in
possession.

But as regards mortgages executed after Dec. 31st, 1881, it has now been enacted that a mortgagee in possession shall have power to cut and sell timber and other

(a) *Marsh v. Wells*, 2 S. & S. 87; see *Tucker v. Linger*, 21 Ch. D. 18.

(b) *Greene v. Cole*, 2 Wms. Saund. 252 and notes; *Woodhouse v. Walker*, 5 Q. B. D. 404.

(c) *Doherty v. Allinan*, 3 App. C. 709.

(d) *Att-Gen. v. D. of Marlborough*, 3 Madd. 538.

(e) *Ibid.*, 498, 536, 539.

(f) *Farrant v. Lovel*, 3 Atk. 723.

trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, unless a contrary intention is expressed in the mortgage deed (*g*).

On the other hand, a mortgagor in possession will be restrained from waste at the suit of the mortgagee, on his showing that the security would be thereby rendered insufficient or scanty (*h*).

iii. The most important of the cases under this heading are those which are illustrated by the leading authority of

Mortgagor.

Tenant for life, remainder for life.

GARTH v. COTTON

[1 Ves. sr. 524, 546; 1 Dick. 183; 1 W. & T. L. C. 751].

In its simplest form it is as follows: An estate is limited to a tenant for life, remainder to another for life, with remainder over in fee or in tail. Here the remainderman for life could not sue for waste at law, because he has not the inheritance; and the remainderman in fee or tail could not sue, because the plaintiff at law must recover the place wasted, and that would be an injustice to the remainder for life which is not forfeited. Under such circumstances equity has a very ancient jurisdiction to grant an injunction (*i*), either at the suit of the owner of the inheritance, or of the mesne remainderman for life (*k*).

As to executory devises, after some doubts (*l*) it seems to be settled that a devisee in fee, with an executory devise over on his death without leaving issue, may be restrained from equitable, but not from legal waste (*m*), though a testator could make such a tenant impeachable for legal waste by express words (*n*).

Devisee in fee, with executory devise over.

(*g*) 44 & 45 Vict. c. 41, s. 19.
 (*h*) *Humphreys v. Harrison*, 1 J. & W. 581; *King v. Smith*, 2 Ha. 239.
 (*i*) *Tracy v. T.*, 1 Vern. 23.
 (*k*) *Dayrell v. Champneys*, 1 Eq. Ca. Ab. 400.

(*l*) *Robinson v. Litton*, 3 Atk. 309; *Stansfield v. Habbergham*, 10 Ves. 278.
 (*m*) *Turner v. Wright*, 1 Johns. 740; 2 De G. F. & J. 234.
 (*n*) *Blake v. Peters*, 1 De G. J. & S. 345.

Waste by
person under
adverse title.

Where a plaintiff in possession sought an injunction to restrain waste by a person claiming under an adverse title, the tendency of the Court was to grant the relief prayed, at least when the acts complained of did or might tend to the destruction of the estate (*o*); and now, by Judicature Act, 1873, s. 25, sub-s. 8, such an injunction is expressly placed within the discretion of the Court.

Waste by
tenants in
common.

Though tenants in common will not in general be restrained from committing either ordinary or equitable waste, equity will interfere between them to prevent malicious or destructive waste—as, for instance, cutting saplings and timber trees or underwood at unseasonable times (*p*). And under special circumstances ordinary waste has been restrained—for instance, where the parties interested were only equitable tenants in common, and the one who was committing the waste not only was not entitled to the possession, but was also insolvent, and unable to pay to his co-tenants their shares of the produce of the waste (*q*). After a decree has been made in a partition suit between such tenants, the Court has jurisdiction to restrain waste (*r*).

Under-lessee.

A ground landlord may have an injunction to stay waste against an under-lessee, where the original lessee, by collusion or neglect, does not seek to restrain it (*s*).

(c.) *Equitable remedies.*

Superiority of
equitable
remedies.

(1.) The jurisdiction of equity in matters of waste is not less due to the superior remedial processes which it commands, than to the broader principles which it applies. At common law, previous to the addition to its power effected by 17 & 18 Vict. c. 125, there existed no power to interfere with the commission of waste generally. The injured party could at most recover damages to indemnify

(*o*) *Lowndes v. Bettie*, 10 Jur. N. S. 226; 12 W. R. 399.

(*p*) *Hole v. Thomas*, 7 Ves. 589; *Clegg v. C.*, 3 Giff. 322, 336.

(*q*) *Smallman v. Onions*, 3 Bro. C. C. 621.

(*r*) *Wright v. Atkyns*, 1 V. & B. 313.

(*s*) *Farrant v. Lovel*, 3 Atk. 723.

himself after the wrong had been done. On the contrary, equity could always be appealed to where a single act of waste could be established, to interfere by injunction to restrain the offending party from any further acts of like nature; and this whether the waste complained of were legal or equitable (*t*). Again, while common law was hampered in its estimation of damages by the want of the machinery requisite for examining lengthy matters of account, which are the usual concomitants of such suits as those arising from wrongful waste, equity could readily undertake such inquiries, and conduct them to a certain issue.

(2.) It was formerly a much disputed question, whether there was any jurisdiction in equity to decree an account where no case lay for an injunction; the objection being that after the waste had been committed the dispute between the parties was only one of pecuniary loss, the complete and proper remedy for which was by action at law. This reasoning was successful in *Jesus College v. Bloom* (*u*), and *Smith v. Cooke* (*x*), where the jurisdiction to decree an account was considered to arise as an incident of the power to restrain by injunction, and to have no existence where, there being no possibility of a repetition of the offence, an injunction could not be required. But in *Parrot v. Palmer* (*y*), the conclusion was reached, which, with the exceptions to be presently referred to, may be accepted as expressing the true principles, viz., that where there was a remedy at law for waste, an account would not be decreed except as incident to an injunction; but that where there was only a remedy in equity, as would always be the case where equitable waste was charged, an account would be granted, although there was no injunction. The importance of the distinction has evidently disappeared

Account,
whether
incident only
to injunction.

(*t*) *Coffin v. G.*, 6 Madd. 17.
(*u*) 3 Atk. 262; Amb. 54.

(*x*) 3 Atk. 381.
(*y*) 3 My. & K. 632.

since the fusion of legal and equitable remedies by the Judicature Acts.

To whom
proceeds of
timber
belong.

(3.) The next question is as to whom timber and other materials subject to waste, when severed, belongs. The answer to this depends on the mode of severance. This may either be by the act of God, or by the act of the defendant or a third party, or by order of the Court. Each case requires separate examination.

Severed by
act of God.

(i.) As a general rule, where by the act of God, as by a tempest, things are severed from the inheritance while a tenant for life impeachable for waste is in possession, whether materials of a house, timber, or the produce of mines, they will become at once the property of the owner of the first estate of inheritance *in esse* (z), even although there may be an intervening estate of freehold in a tenant for life without impeachment of waste (a).

When tenant
for life
entitled.

A tenant for life, however, is entitled to have the benefit arising from the sale of all such things severed by the act of God, as he was entitled himself to sever (b). If, therefore, the tenant for life is not impeachable for waste, things severed which would amount in the other circumstance to legal waste, belong to him; but things, such as ornamental timber, which equity would restrain even him from severing, will belong to the first owner of the inheritance *in esse* (c).

Where an estate was settled as personalty through the medium of a trust for sale, the proceeds of sale of trees blown down were required to be invested by the trustees, and the equitable tenant for life was held entitled out of the income thereof, and, if necessary, of the capital, to an annual sum equal to the estimated income which would have been derived from the estate if no gales had

(z) *Uvedall v. U.*, 2 Roll. Ab. 119.

(a) *Pigot v. Bullock*, 1 Ves. 484; *Gent v. Harrison*, Johns. 517, 524.

(b) *Bateman v. Hotchkin*, 31 Beav. 486.

(c) *M. of Ormond v. Kynnersley*, 7 L. J. O. S. Ch. 150; 8 *ibid.* 67; *Wellesley v. W.*, 6 Sim. 497.

occurred (*d*). It is a question of fact whether or not a tree is so far severed from the soil as to become personalty, being taken out of the principle *quidquid plantatur solo, solo cedit* (*e*).

(ii.) If things are severed from the inheritance by a trespasser, or by the waste of tenants, or by the life tenant impeachable for waste (without collusion with the owner of the inheritance), the rule is generally the same as if it were severed by the act of God (*f*). When severed
by trespasser
or tenants.

Following, also, the analogy of acts done by a tenant for life impeachable for waste, which though falling within the general definition of legal waste, are under the circumstances considered permissible, where a tenant not impeachable for waste commits acts which generally would amount to equitable waste, but does so under circumstances under which the Court would have ordered them, he is entitled to the proceeds (*g*).

Where, however, such things have been severed by the tenant for years or for life impeachable for waste in collusion with the first owner of the inheritance, equity will not allow the owner of the inheritance to benefit thereby, but will order the fund thereby produced to be invested so as to follow the uses of the settlement of the land, or, if a prior owner of the inheritance comes subsequently into existence, will order it to be paid to him (*h*). Moreover, if the life tenant has in himself the next existent state of inheritance, subject to intermediate contingent remainders, he will not be allowed to take advantage of his own wrong in committing waste; but the benefit thereof will be preserved for the contingent remaindermen by investment to follow the uses of the settlement (*i*). Circumstances, how-

(*d*) *Harrison v. H.*, 28 Ch. D. 220.

(*e*) *Swinburn v. Ainslie*, 30 Ch. D. 485; 28 *ibid.* 89.

(*f*) *Uvedall v. U.*, *sup.*; *Honywood v. H.*, 18 Eq. 311.

(*g*) *Baker v. Sebright*, 13 Ch. D. 179.

(*h*) *Garth v. Cotton*, *sup.*, p. 713.

(*i*) *Williams v. Bolton*, 3 P. Wms. 268, cited; *Powlett v. Bolton*, 3 Ves. 374; *Seagram v. Knight*, 2 Ch. 628.

ever, which seem to justify the acts of the life tenant, for instance, the contemporaneous expenditure of an equal or greater sum of money by him in improvements, have sufficed to prevent the application of this rule (*k*).

When severed
by order of
Court,

(iii.) If things are severed from the inheritance by order of the Court (*e. g.*, timber is ordered to be felled on account of its being in decay, or interfering with the growth of other timber), it will direct the interest of the proceeds to be paid to the tenant for life, though impeachable for waste (*l*), and as such timber money will be considered as realty, on the death of a tenant in fee, first owner of the inheritance, if he has done nothing to convert it into personality, his heir will be entitled to it (*m*).

or by trustee.

The rule is the same where a trustee has felled timber and the Court has adopted his act (*n*). The Court will, however, never so adopt the act of a tenant for life impeachable for waste who takes upon himself to cut and sell timber without authority: he does this at his peril, and can take no advantage from it (*o*).

Periodical
cutting.

The produce of the sale of underwood, timber cut periodically, and gravel from pits already open, will be paid to the tenant for life, though impeachable for waste, as being part of the income of the estate (*p*).

2. Injunctions against trespass.

In many respects analogous to the jurisdiction to restrain waste is that which enables Courts of equity to grant the protection of injunction in certain cases of trespass.

The principles of the jurisdiction are precisely those which govern the whole class of injunctions in aid of legal rights. The Court requires to be assured of the existence of the legal right, that a breach of the right is immi-

(*k*) *Birch-Wolfe v. Wolfe*, 9 Eq. 683, 691.

(*l*) *Tooker v. Annesley*, 5 Sim. 235; *Tollemache v. T.*, 1 Ha. 456.

(*m*) *Field v. Brown*, 27 Beav. 90.

(*n*) *Waldo v. W.*, 12 Sim. 107, 112.

(*o*) *Seagram v. Knight*, 2 Ch. 632.

(*p*) *Cowley v. Wellesley*, 1 Eq. 656.

nent (*q*), and that irreparable or at least serious damage is likely to result (*r*).

The jurisdiction to grant relief in cases of mere trespass, as distinguished from waste (in which there is privity of title between the parties), seems to have been first asserted in *Flamang's Case* (*s*), where the plaintiff was in possession of a close, and the defendant was working into his minerals and taking away the very substance of his estate. It has since been repeatedly asserted in cases falling within the above-mentioned conditions (*t*).

A mere ordinary naked trespass will not be restrained by injunction (*u*). Thus the Court has refused to restrain a person from vexatiously distraining on the tenants of the plaintiff (*x*). But an act not of itself amounting to serious damage may by continuance or repetition be held to come within the remedy of injunction (*y*).

If the alleged trespass consists in the erection of works or buildings on the plaintiff's land, an injunction may be had as long as they are in an incomplete state (*z*); but if they have been completed the plaintiff will generally be left to his remedy by damages (*a*). This rule has, however, been departed from and an injunction granted where the conduct of the defendant has been fraudulent, vexatious, or oppressive, and where the trespass has been of an exceptionally serious nature (*b*).

The remedy of injunction in cases of trespass is more readily granted against public companies or corporations having compulsory statutory powers than against private

Origin and nature of the jurisdiction.

Naked trespass not restrained.

Erection of buildings, when restrained.

Trespass by public companies.

(*q*) *Stannard v. Vestry of St. Giles*, 20 Ch. D. 190.

(*r*) *Supra*, pp. 704—5; *Cooper v. Crabtree*, 20 Ch. D. 589.

(*s*) Cited 6 Ves. 147; 7 Ves. 308.

(*t*) *Mitchell v. Dors*, 6 Ves. 147; *Hanson v. Gardiner*, 7 *ibid.* 305; *Gaskin v. Balls*, 13 Ch. D. 324.

(*u*) *Mogg v. M.*, 2 Dick. 670.

(*x*) *Best v. Drake*, 11 Ha. 369; *Aldis v. Fraser*, 15 Beav. 220.

(*y*) *L. & N. W. R. v. L. & Y. R.*, 4 Eq. 178; *Allen v. Martin*, 20 Eq. 465.

(*z*) *Farrow v. Vansittart*, 1 Ra. Ca. 602; *Goodson v. Richardson*, 9 Ch. 221.

(*a*) *Deere v. Cust*, 1 My. & C. 516.

(*b*) *Powell v. Aiken*, 4 K. & J. 343; *Bowser v. Maclean*, 2 De G. F. & J. 415.

persons; and generally the plaintiff is not required to show destructive or irreparable damage. An equity is raised on the plaintiff's behalf by the fact of the power and resources commonly enjoyed by such public bodies, the Court being always disposed to keep them strictly within the terms of the authority conferred upon them (*c*). In these cases the inclination to grant the special relief of equity is so strong, that it will only be refused in cases where the damage is so slight as to be almost inappreciable, or where the ordinary legal remedy is evidently adequate and sufficient (*d*). Where the dispute is between two incorporated companies, the same principles apply as in ordinary cases (*e*).

Trespasses
affecting
public inte-
rest.

In cases of trespass, as in those respecting nuisances, if the act complained of affects the public interest, the proper remedy is by information at the suit of the Attorney-General (*f*); and in this case evidence of actual damage is not required (*g*). But if, in addition to the interference with a public right, special damage is done to a private person, he has a right to sue (*h*); so that in such a case there may be both an information and an action (*i*).

Plaintiff must
be prompt.

A plaintiff seeking the interference of the Court to restrain a trespass must be prompt in making his application. Relief will be refused if he has stood by and allowed another to spend money on his property upon the faith that no objection will be made (*k*).

Account.

In cases of trespass, as in others, the remedy of account is often incident to that of injunction. This is especially the case in mining suits. The rule in these is that if the

(*c*) *Kerr, Inj.*, p. 120; *Kemp v. L. & B. R. Co.*, 1 Ra. Ca. 495.

(*d*) *Turner v. Blamire*, 1 Drew. 409; *River Dun, &c. Co. v. N. M. R. Co.*, 1 Ra. Ca. 121.

(*e*) *M. S. & L. R. Co. v. G. N. R. Co.*, 9 Ha. 284.

(*f*) *Att.-G. v. Cleaver*, 18 Ves. 217; *Att.-G. v. Forbes*, 2 My. & C. 133.

(*g*) *Att.-G. v. Shrewsbury, &c. Co.*, 21 Ch. D. 752.

(*h*) *Semple v. L. & B. R. Co.*, 9 Sim. 209.

(*i*) *Att.-G. v. Sheffield Gas Co.*, 3 De G. M. & G. 304; *Att.-G. v. U. K. Telegraph Co.*, 30 Beav. 287.

(*k*) *Gordon v. Cheltenham R. Co.*, 5 Beav. 229; *Marker v. M.*, 9 Ha. 16.

plaintiff knew, or with reasonable diligence might have known, of the wrongful taking, the account will be limited to six years (*l*). But in the absence of such knowledge or negligence, or if the defendant has acted wittingly, and *à fortiori* if he has been guilty of concealment or fraud, the account is not so limited (*m*); and the trespasser may be charged the full value of the minerals taken, without allowance for the expense of severing them (*n*). Moreover, an inquiry is often directed with a view to allowing the plaintiff compensation for any damage which may have been done (*o*). Inquiry as to damages.

3. Injunctions against nuisances.

A nuisance, as distinguished from a trespass, is an act which causes substantial injury to the corporeal or incorporeal hereditaments of other persons unaccompanied by any invasion of the property itself (*p*). Nuisance defined.

In considering the now well established jurisdiction of equity to restrain nuisances, it is in the first place most material to distinguish between private and public nuisances. A private nuisance is one which affects the comfort or enjoyment of only one individual, or, at most, a limited class of individuals. A public nuisance is one which similarly affects all persons who come within the sphere of its operation. The importance of the distinction lies in the fact that in the case of a private nuisance the injured person has a personal right to a civil action for its redress, though it is not in every case that he will be entitled to the special remedy of injunction: the circumstances which warrant this will be presently considered. The proper remedy for a public nuisance, on the other Public and private nuisances distinguished.

(*l*) *Dean v. Thwaite*, 21 Beav. 623; *Dawes v. Bagnall*, 23 W. R. 690.

(*m*) *Eecl. Commis. v. N. E. R. Co.*, 4 Ch. D. 845.

(*n*) *Philipps v. Homfray*, 6 Ch. 770; *Llynvi Co. v. Brogden*, 11 Eq. 188.

(*o*) *Hunt v. Peake*, Johns. 705; *Jegon v. Vivian*, 6 Ch. 742.

(*p*) *Kerr, Inj.*, 165.

hand, is an information at the suit of the Attorney-General (*q*).

Nuisance both public and private.

If the act complained of is of such a nature as to interfere with the comfort or enjoyment of all within its reach, and at the same time to cause a special and distinct injury to a limited class of persons, it is both a public and private nuisance, and the person causing it is obnoxious to both remedies. The person or persons suffering the special damage may bring an action; and at the same time the Attorney-General may proceed on behalf of the public (*r*). But in order to justify the private action, the injury done to the plaintiff must be of a different character from that which he suffers in common with the public. It does not suffice that from his mere proximity to the nuisance he happens to suffer more inconvenience than others (*s*).

Nuisance or not a question for jury.

It would lead us too far afield here to enter upon an investigation of the extensive subject as to what constitutes a public or private nuisance. Such an inquiry is more appropriate to a treatise on common law. The question of nuisance or no nuisance is eminently one of fact for a jury, and though, by virtue of 25 & 26 Vict. c. 42 (*t*), or under the more recent provisions of the Judicature Acts, it may be tried in the Chancery Division, it involves no distinctively equitable principles. Our concern is merely with those special circumstances which call for the peculiar remedy of injunction.

General principles.

Nor is it necessary here to repeat at length those general conditions, already stated, which are always required by Courts of equity before they will grant this assistance in aid of a legal right. In these as in other cases the plaintiff must show that the legal remedy of damages would not afford an adequate compensation; and this generally requires proof that the injury will be permanent, or con-

(*q*) See *Soltau v. De Held*, 2 Sim. N. S. 142.

(*r*) *Att.-G. v. U. K. Telegraph Co.*, 30 Beav. 287.

(*s*) *Ware v. Regent's Canal Co.*, 3 De G. & J. 212.

(*t*) Rolt's Act.

stantly recurring, or irreparable (*u*). As in cases of trespass, so here, a mere threatened injury will not generally suffice to call forth the interference of the Court. But if a man insists upon his right to do the act complained of, that is a sufficient ground to justify an injunction, even though no nuisance has been actually committed (*x*); and there are other cases in which the Court has so interfered before the nuisance has been committed, on clear proof that the act sought to be restrained will inevitably result in injury (*y*).

It now only remains to illustrate the application of the remedy from the cases most usually occurring in practice.

(1.) One large class of cases to which the remedy of injunction is appropriate consists of those in which the right for which protection is sought concerns the enjoyment of dwelling-houses or places of manufacture or business. Nuisances affecting houses.

With respect to such cases generally, it must be observed Generally. that there exists no hard and fast line by which to determine whether or not an act amounts to a nuisance. This depends upon the circumstances of the case; for instance, the purpose for which the house is used, and the character of the neighbourhood. An act may amount to an actionable injury to a dwelling-house which would not be so with respect to a manufactory; and an act may be deemed a nuisance in a sanatorium which would not be so in the vicinity of wharves (*z*). Moreover, the question will not be determined by the standard of persons of elegant and dainty habits, but by the simple notions of those in ordinary life (*a*).

(*u*) *Fishmongers' Co. v. East India Co.*, 1 Dick. 163; *Wynstanley v. Lee*, 2 Swanst. 335.

(*x*) *Elliott v. N. E. R. Co.*, 1 J. & H. 156; 2 De G. F. & J. 423; 10 H. L. 333; *Pennington v. Brinsop, &c. Co.*, 5 Ch. D. 769.

(*y*) *Haines v. Taylor*, 2 Ph. 209; *Dawson v. Paver*, 5 Ha. 430.

(*z*) *Jackson v. D. of Newcastle*, 3 De G. J. & S. 284; *Kelk v. Pearson*, 6 Ch. 811.

(*a*) *Walter v. Selfe*, 4 De G. & S. 322; *Cooper v. Crabtree*, 20 Ch. D. 589.

Ancient
lights.

A multitude of cases falling within this class concern the right to light and air. A right to the free passage of light and air may be acquired by grant or express agreement, or by enjoyment for such time and under such circumstances as will satisfy the Prescription Act (*b*); and when so acquired a substantial interference therewith is actionable. But in order to be so it must be sufficient in degree to constitute a real injury, and not mere inconvenience to the plaintiff, a question of difficulty which of course no general expressions can decide (*c*); and practically speaking, when the injury is sufficient to warrant an action at law, an injunction may be obtained in equity (*d*).

General rule
as to dis-
tance.

The Court will not usually restrain the erection of a building the height of which above the ancient light is not greater than the distance between the building and the light (*e*). The fact of the building being at such a distance is *prima facie*, but not conclusive, evidence that it will not cause a sufficient interference with the light to warrant an injunction. In such cases the Court will only restrain the building on special evidence of injury (*f*).

New erections
in place of
old ones.

An owner of ancient lights, who in rebuilding or altering his house puts in new windows or enlarges old ones, acquires no right to a greater amount of light than he enjoyed before, but he retains his right to as much light as before, or rather to as much light as he could obtain through windows of the same aperture as the old ones (*g*); and it is not necessary that the new house should be for all purposes identical with the old one (*h*).

No right to
prospect.

There is no easement in English law corresponding to

(*b*) 2 & 3 Will. IV. c. 71. See *Russell v. Watts*, 10 App. C. 90.

(*c*) *Back v. Staey*, 2 Car. & P. 465.

(*d*) *Leech v. Schweder*, 9 Ch. 476; *Greenwood v. Hornsey*, 33 Ch. D. 471.

(*e*) *Beadel v. Perry*, 3 Eq. 466.

(*f*) *City of London Brewery Co. v. Tennant*, 9 Ch. 212; *Parker v. First*

Avenue Hotel Co., 24 Ch. D. 282.

(*g*) *Turner v. Spooner*, 1 Dr. & Sm. 467; *Newson v. Pender*, 27 Ch. D. 43; *Scott v. Pape*, 31 Ch. D. 554; *Aynsley v. Glover*, 10 Ch. 286.

(*h*) *National, &c. Co. v. Prudential Ass. Co.*, 26 W. R. 27; *Bullers v. Dickenson*, 29 Ch. D. 155.

the servitude *ne prospectui officiatur* in Roman law. However much the obstruction of a view may interfere with the enjoyment or depreciate the value of property, it affords no ground for an action (*i*). *A fortiori*, the mere unsightliness of a building (*k*), or the fact that it overlooks grounds previously private gives no title to legal or equitable relief (*l*). And though the easement above referred to is commonly described as a right to light and air, there seems to be no case in which an obstruction to the free passage of air has been made the basis of an action, or has been seriously considered in the estimation of damages. It has been said that it is only in very rare and special cases, involving danger to health, or at least something very nearly approaching to it, that the Court would be justified in interfering on the ground of diminution of air (*m*). Right to air.

The right to *purity* of air is an easement of quite a different kind, quite independent of grant or prescription; and any considerable pollution thereof is a nuisance which may be restrained (*n*). It depends greatly on the locality what degree of interference will be sufficient to ground an action. In any case there must be a sensible and real damage inflicted. A right to carry on an offensive trade may be acquired by prescription, but no length of time can legalise a public nuisance (*o*). Pollution of air.

If, again, real damage or great inconvenience is occasioned by the carrying on of a noisy trade or otherwise causing excessive noise or vibration, an action may be brought and an injunction obtained to restrain its continuance. Here, again, the decision depends greatly on the Noises.

(*i*) *Aldred's Ca.*, 9 Co. 58 a; 221; and see *Radcliffe v. D. of Portland*, 3 Giff. 702.

(*k*) *Att.-G. v. Doughty*, 2 Ves. jr. 453.

(*l*) *Jones v. Tipling*, 12 C. B. N. S. 842.

(*m*) *Per Lord Selborne*, 9 Ch.

(*n*) *Aldred's Ca.*, *sup.*; *St. Helens Smelting Co. v. Tipping*, 11 H. L. 642; *Sellors v. Matlock Bath*, 14 Q. B. D. 928.

(*o*) *Weld v. Hornby*, 7 East, 199.

locality; and each case must be decided on its own circumstances.

Rights to
lateral sup-
port of land;

(2.) Another extensive and important class of cases rests on the right of a landowner to the lateral support of his land in its natural state. This right is a common law right altogether independent of prescription. He may, therefore, restrain his neighbour from so digging into the adjacent soil as to cause a subsidence of the surface of his land. No action lies until damage has actually been done; but when this has happened, it is no defence to show that the works causing the damage have been carried on with care and skill (*p*).

of buildings.

But the right to the support of a building by the adjacent soil of an adjacent owner is of a different nature. This is not a natural right of property; it is an easement which can only be acquired by prescription from the time of legal memory, or by grant express or implied (*q*). It may, moreover, be acquired by the circumstance that the building has stood for twenty years, if during that period the owner of the adjacent soil knew, or might have known, that the building was thereby supported and was capable of making a grant; and after twenty years' enjoyment in point of fact the claim to the right will not be defeated by proof that no grant of the easement was ever made (*r*).

Rights
respecting
water,

(3.) Another large class of nuisances which often provoke equitable interference, relates to rights respecting water. All acts done by a man on his own land, whereby the rights of his neighbour respecting water are injuriously affected, or whereby water becomes a cause of damage to the land of his neighbour, are considered as nuisances relating to water (*s*).

We cannot digress into a particular account of the

(*p*) *Hunt v. Peake*, John. 710. 162; 6 App. C. 740; *Lemaitre v. Davis*, 24 Ch. D. 287.
 (*q*) *Tone v. Preston*, 24 Ch. D. 739; *Rigby v. Bennett*, 21 *ib.* 559. (*s*) *Kerr*, Inj. p. 224; *Ballard v. Tomlinson*, 29 Ch. D. 115.
 (*r*) *Angus v. Dalton*, 4 Q. B. D.

various rights to water. They may be conveniently classified as rights respecting quantity, and rights respecting quality.

The riparian proprietors have a right to the use of the water which flows by their land, and this right is incident to the ownership of the adjacent soil. And the right being enjoyed by the successive proprietors along the bank, none may so interfere with the water as to prejudice those above or below him, unless, of course, he has some special title to exclusive enjoyment. He may therefore be restrained from diverting the stream, or materially diminishing the quantity which would naturally flow to his neighbours below (*t*); or, on the other hand, from damming back the stream so as to cause an overflow on the land of his neighbour above him.

Secondly, a riparian proprietor has a right to a natural stream in a natural state of purity. He may therefore restrain the fouling of the water, and this without even proof of actual injury (*u*). And it is immaterial that the stream was previously in some degree polluted. The right is as clear to prevent an increase of pollution as to prevent pollution in the first instance (*u*).

The rights respecting artificial watercourses must, however, be carefully distinguished from the above. The water in an artificial stream is the property of the person by whom it is created or caused to flow. In the absence of long enjoyment he has no right to discharge it on the land of another; while his neighbour cannot claim the continuance of the flow, notwithstanding that a right to discharge it may have been acquired by the producer (*x*).

The public rights in navigable rivers are likewise frequently protected by means of the remedy of injunction. These rights may be infringed either by buildings, &c.,

(*t*) *Ferrand v. Corp. of Bradford*, 478; *Pennington v. Brinsop, &c. Co.*, 21 Beav. 412.
 5 Ch. D. 772.
 (*u*) *Crossley v. Lightowler*, 2 Ch. (*x*) *Kerr, Inj.* 235.

which interfere with the public right of navigation, or by the fouling of rivers in such a manner as to be injurious to the public health, or destructive of a fishery (*y*); and where a sufficient case of injury is established the nuisance may be restrained at the suit of the Attorney-General.

Other
nuisances.

It must suffice merely to mention other extensive classes of nuisances which are dealt with on the principles already amply expounded; for instance, obstructions of public highways and private rights of way, obstructions of the seashore and of ferries, markets, commons, &c.

Nuisances
authorised by
statute.

Before dismissing the subject of nuisances, it must be observed that when a statutory power has been conferred to do an act which otherwise might have been actionable, the person so protected is not amenable to the process of the Court as long as he confines himself strictly to the limits of the power conferred upon him. The unlawful character of the act is taken away by the sanction of the legislature, however injurious it may be (*z*). Such powers when conferred must, however, be strictly complied with. Any injurious act which is not covered by their provisions brings the offender at once within the reach of the law (*a*).

Injunctions against libel, &c.

Crimes not
restrained.

Abundant illustrations have been given of the application of the remedy of injunction to restrain the commission of torts. Moreover, it is clear that equity will not interfere by injunction to restrain the commission of a crime. But there is a class of offences which partakes both of the nature of a tort and of that of a crime, inasmuch as a breach of the rights to which they refer renders the offender at once liable to a civil action and to criminal

(*y*) See *Att.-G. v. Lonsdale*, 7 Eq. 388; *Att.-G. v. Terry*, 9 Ch. 423; *Att.-G. v. Mayor, &c. of Kingston-upon-Thames*, 34 L. J. Ch. 481; *Bridges v. Highton*, 11 L. T. N. S. 653.

(*z*) *Rex v. Pease*, 4 B. & A. 30; *London & Brighton Ry. v. Truman*, 11 App. C. 45.

(*a*) *Att.-G. v. Leeds Corp.*, 5 Ch. 591; *Clowes v. Staffordshire Potteries Co.*, 8 Ch. 139; *Metrop. Asylum v. Hill*, 6 App. C. 193.

proceedings. The most conspicuous illustration of such offences is afforded by cases of libel; and it is necessary to inquire whether or not equity will interfere by injunction in such cases.

Now the general purpose on which injunctions are granted is for the protection of property; and unless the plaintiff can show that injury to his property is threatened, equity will not assist him. It is evident that the offence of libel will rarely come within this condition; and accordingly we find that, as a rule, an injunction cannot be obtained to restrain a publication of this character (*b*). But where the nature of the libel complained of is such as to injure the plaintiffs in their trade, an injunction may be granted (*c*). And even an oral slander, which is detrimental to the business of the plaintiff, may be restrained by injunction (*d*). On similar grounds a conspiracy calculated to drive a person out of his trade, such as is designated by the modern term "boycotting," may be the subject of injunction where irreparable damage is threatened (*e*).

Libel, when restrained.

II. *Injunctions protecting Patent Rights, Copyright, Trade Marks, and Goodwill.*

It is convenient to class together the rights here mentioned, since though they are in themselves strongly contrasted, the jurisdiction of equity respecting them rests on the same foundation, namely, the desirability of preventing a multiplicity of suits and vexatious litigation.

Grounds of the jurisdiction.

- (*b*) *Mulkern v. Ward*, 13 Eq. 619; *Prudential Ass. Co. v. Knott*, 10 Ch. 142. 501; *Hill v. Hart-Davies*, 21 *ib.* 798; *Hayward v. H.*, 34 *ib.* 198.
 (*d*) *Herrmann Loog v. Bean*, 26 Ch. D. 306.
 (*e*) *Thorley's Cattle Food Co. v. Massam*, 14 Ch. D. 763; *Quartz Hill, &c. Co. v. Beall*, 20 Ch. D. 476. (*e*) *Mogul Steamship Co. v. M'Gregor, Gow & Co.*, 15 Q. B. D. 476.

Inadequacy
of the remedy
at law.

The rights in themselves are fully recognised at law, and have always sufficed to ground an action at law for damages. But it is evident that such a remedy supplies an exceedingly inadequate protection. Not only might the patentee, or author, or owner of a trade mark be compelled to bring innumerable actions, and thus be ruined by interminable litigation, but in many cases damages, even if recovered, would afford an insufficient redress for the injury sustained. The business or the reputation might be impaired by the interference pending the litigation, in a manner and to an extent which no inquiry could ascertain (*f*). And further, the facility for taking accounts afforded by equity, and yet more conspicuously its power of peremptorily stopping the infringement of the right by injunction, plainly indicate the appropriateness of the jurisdiction of its Courts for dealing with such matters.

It must suffice very briefly to describe the rights themselves here under review, the particular object being to ascertain under what circumstances an aggrieved party can obtain an injunction against an infringement of them.

1. Patent Rights.

Origin of
patents.

(1.) The abuse of the royal prerogative of granting patents for monopolies, and the disputes which arose therefrom, are well-known matters of English history, and need not be here recapitulated (*g*). Suffice it to say, that the result thereof was the statute 21 Jac. I. c. 3, which abolished the general power of granting monopolies and patents, but by express reservation excepted the power of granting letters patent for the term of fourteen years or under to the inventor of any *new manufacture*, provided it were not contrary to law nor mischievous to the State (*h*). On this statute alone the legality of patent rights as enjoyed by inventors rested for many years.

21 Jac. I.
c. 3.

It has been followed by various enactments passed from

(*f*) *Hogg v. Kirby*, 8 Ves. 223.

(*g*) See *Mompesson's Case*, 2 How. St. Tr. 1119.

(*h*) s. 6.

time to time for the amendment of the law, and finally by the Patents, Designs, and Trade Marks Act of 1883, and the amending Acts of 1885 and 1886 (*i*), to which the student must now resort for a full statement of the present law on the subject.

The first question which arises is as to what may be the subject of the right.

It is to be observed that the statute of James uses only the term "manufacture," and neither this nor the succeeding statutes have at all enlarged the right as previously existing at common law. The subject-matter of a patent must therefore come within this term, and must be for a legal purpose. It would be supererogatory to trace the course of the decisions by which these conditions are now in some degree defined: it is sufficient to briefly summarise their results.

The word "manufacture" has indeed received a liberal interpretation, and not only comprehends anything made, but also the mode, method or process of making; it comprises, therefore, not only vendible articles, the result of chemical or mechanical processes, but new machines or new combinations of machinery, or an improvement of an old process (*k*).

It is, however, to be particularly observed, that a bare principle cannot be the subject of a patent. For instance, no one could obtain a patent for the mere idea of utilising electricity as a motor power (*l*). The discovery of a principle is not an invention in the sense of patent law. The means must be shown of practically applying the principle (*m*). This distinguishes a principle from a process.

Secondly, the invention must be new. It is not indeed necessary that the object produced should be of a species

"Manufactures."

What comprehended.

No patent obtainable for a mere principle.

Novelty necessary.

(*i*) 46 & 47 Vict. c. 57; 48 & 49 Vict. c. 63; 49 & 50 Vict. c. 37.

(*k*) Kerr, *Inj.* 282; Johnson's *Pat. Man.* 7th ed. 5; *Crane v. Price*, 4 Mac. & G. 580; *Ralston v. Smith*, 11 H. L. 223.

(*l*) *Jupe v. Pratt*, 1 W. P. C. 145; *Dangerfield v. Jones*, 13 L. T. N. S. 142.

(*m*) *Boulton v. Bull*, 2 H. Bl. 463.

unknown before, but the process of making it must be the true and original invention of the person seeking protection; original not only in the sense that he derived it from no one, but in the sense that no one had used it before (*n*). Previous sale even by the inventor himself would avoid the patent (*o*). Previous user beyond the realm or in the colonies is, however, no objection to a patent (*p*).

The present statutes provide under certain conditions that the exhibition of an invention at an industrial or international exhibition shall not prejudice patent rights (*q*). *Prima facie* a patentee is not the first inventor if before the date of the patent an intelligible description of the invention in English or any other well-known language, is shown to have existed in this country; but the presumption may be rebutted by evidence that the existence of such a description was not in fact known, or that it could not have been seen by anyone who could understand it (*r*).

Utility.

Thirdly, it must be useful; but this word is applied with considerable latitude (*s*).

Procedure.

These are, briefly stated, the conditions which determine what may be the subject of a patent right. But not only must the matter for which protection is sought fall within these conditions; the inventor must also, in order to procure patent privilege, closely follow the procedure laid down by the statutes above referred to.

What amounts to infringement.

(2.) A patent is infringed when a man directly or indirectly uses the protected invention, or produces the same result by means only colourably different. Similarity in principle between two machines will not constitute an infringement, if the mode of operation is different, though

(*n*) *Tennant's Case*, Dav. on Pat. 429; *United Telephone Co. v. Harrison*, 21 Ch. D. 720.

(*o*) *Wood v. Zimmer*, 1 Holt, N. P. C. 58.

(*p*) *Edgeberry v. Stephens*, 2 Salk. 447; *Rolls v. Isaacs*, 19 Ch. D. 268.

(*q*) 46 & 47 Vict. c. 57, s. 39;

49 & 50 Vict. c. 37, s. 3.

(*r*) *Harris v. Rothwell*, 35 Ch. D. 416; distinguishing *Otto v. Steel*, 31 *ib.* 241.

(*s*) *Manton v. Parker*, Dav. P. C. 327. See *Badische Anilin, &c. v. Levinstein*, 29 Ch. D. 266; *Ir. App. C.* 746.

the same result may be attained (*t*); nor is there an infringement in the application of a patented machine to a different purpose from that for which it was patented (*u*). It is an infringement to offer patented articles for sale, though no sale takes place (*x*), or to buy or sell in the way of trade articles made by a machine which is itself an infringement (*y*). The mere importation of patented articles is an infringement (*z*). It is immaterial whether there is or is not an intention to infringe (*a*); even ignorance of the existence of the patent is no answer (*b*).

(3.) Such being a brief review of the nature and conditions of patent right, we may now intelligibly observe the application for its protection of the equitable remedies. Remedies.

i. The injunctions sought in patent cases are usually of the interlocutory species. One of the leading authorities on the principles of the Court respecting them is Injunction.

HILL v. THOMPSON

[3 Mer. 622],

which not only substantiates and illustrates what has been above stated as regards the necessity for novelty and utility in the invention (*c*), but also clearly expresses the circumstances under which an injunction would be granted. From that case it appears that with respect to patents which have been for a long time in the exclusive enjoyment of the plaintiff, equity would presume an exclusive right, and would restrain a defendant from infringement thereof without requiring him to establish its validity at law, but that in the case of recently granted patents it would not interpose by injunction. When obtainable.

- (*t*) *Seed v. Higgins*, 8 H. L. 550.
 (*u*) *Newton v. Vaucher*, 6 Ex. 859.
 (*x*) *Oxley v. Holden*, 8 C. B. N. S. 666.
 (*y*) *Wright v. Hitchcock*, L. R. 5 Ex. 38.
 (*z*) *United Telephone Co. v. London, &c. Telephone Co.*, 26 Ch. D.

- 774; and see and distinguish *Nobel's Explosives Co. v. Jones*, 8 App. C. 1.
 (*a*) *Heath v. Unwin*, 15 Sim. 552;
United Telephone Co. v. Sharples, 29 Ch. D. 164.
 (*b*) *Curtis v. Platt*, 3 Ch. D. 138, n.
 (*c*) At p. 629.

tion until the right had been established at law (*d*). But if a good *primâ facie* case is made out the Court has jurisdiction to interfere notwithstanding the recency of the patent (*e*). The plaintiff must in any case show *both* a *primâ facie* title to the patent, and a *primâ facie* case of infringement (*f*).

When the legal right must be established.

If the Court is satisfied of the validity of the patent and of the fact of the infringement, it may grant an injunction at once without requiring the plaintiff to establish his legal right; but it will rarely do this if either the validity of the patent or the fact of infringement is denied. In such cases the Court will usually put the plaintiff to a trial of the right, either in the meanwhile protecting him by interim injunction, or ordering the motion to stand over until the right has been tried; the defendant meanwhile keeping an account, and the plaintiff giving an undertaking as to damages. The Court will, in its discretion, follow whichever of these courses appears most convenient under the circumstances of the case (*g*).

Proper diligence required.

A plaintiff who seeks the aid of the Court must apply with proper diligence. Any open encouragement or acquiescence in the invasion of his right, especially knowingly permitting the defendant to expend moneys upon the faith of non-interference, will bar his right to the extraordinary interference of equity (*h*).

Inspection

In an action for infringement of a patent the Court may, on the application of either party, make such order as it thinks fit for the inspection of premises, and this is often necessary in order to obtain proof of infringement.

and account.

Moreover, the Court is empowered in any such action to

(*d*) See also *Univ. of O. & C. v. Richardson*, 6 Ves. 689; *Mawman v. Tegg*, 2 Russ. 385.

(*e*) *Plimpton v. Spiller*, 4 Ch. D. 286.

(*f*) *Bridson v. Macalpine*, 8 Beav. 230; *Caldwell v. Vanlissengen*, 9 Ha. 424; *Bickford v. Skewes*, 4 My.

& Cr. 500.

(*g*) *Kerr, Inj.* 274; *Bacon v. Jones*, 4 My. & Cr. 436; *Renard v. Levinstein*, 2 H. & M. 628; *Plimpton v. Malcolmson*, 20 Eq. 37; *Plimpton v. Spiller, sup.*

(*h*) *Bridson v. Bencke*, 12 Beav. 1; *Bovill v. Crate*, 1 Eq. 388.

direct an account, and to impose terms and give directions respecting the same (*i*). By a similar jurisdiction samples may be ordered to be delivered up for analysis (*k*).

The present Act provides that if a person claims to be a patentee, and by circulars or otherwise threatens legal proceedings on the ground of his alleged patent, a person aggrieved by such threats may bring an action and obtain an injunction against the continuance thereof, unless the *soi-disant* patentee with due diligence commences and prosecutes an action for infringement (*l*). A private letter has been deemed sufficient to authorise proceedings thereunder (*m*).

Injunction
against
threats.

2. Copyright.

(1.) It is now established that copyright exists only by statute (*n*). The term designates the exclusive right of multiplying a work of literature or art after its publication (*o*). The right commences by publication (*p*), and the publication must be in this country (*q*).

Origin of the
right.

There are many different species of copyright, differing in accordance with the nature of the subject-matter to which it refers.

Various
species of
copyright.

Literary copyright is regulated by the statute 5 & 6 Vict. c. 45, which defines it to be the sole exclusive liberty of printing or otherwise multiplying copies of any subject included in the word book as therein comprehensively defined. Copyright in books published in the lifetime of the author is the property of the author, or his assigns, during his life and seven years afterwards, or for forty-two years, if the latter be the longer term. The copyright in books published after the author's death lasts for forty-two years (*r*).

Literary
copyright,
5 & 6 Vict.
c. 45.

- | | |
|--|--|
| (<i>i</i>) 46 & 47 Vict. c. 57, s. 30. | (<i>n</i>) <i>Jefferys v. Boosey</i> , 4 H. L. |
| (<i>k</i>) <i>Patent, &c. Co. v. Walter</i> , 833. | |
| John. 727. | (<i>o</i>) <i>Ib.</i> 920. |
| (<i>l</i>) 46 & 47 Vict. c. 57, s. 32. | (<i>p</i>) <i>Ib.</i> 815. |
| (<i>m</i>) <i>Driffeld, &c. Co. v. Waterloo</i> , | (<i>q</i>) <i>Routledge v. Low</i> , 3 <i>ib.</i> 100. |
| <i>&c. Co.</i> , 31 Ch. D. 638; <i>Barney v.</i> | (<i>r</i>) s. 3. |
| <i>United Telephone Co.</i> , 28 <i>ib.</i> 394. | |

What may be
subject
thereof.

To come within the protection of the Copyrights Acts, a work need not consist of new or original matter. A compilation of old materials, or materials open to the research of all men, may be the subject of copyright. Thus, copyright may exist in a directory (*s*), a calendar (*t*), a newspaper (*u*), or a catalogue (*x*). But there can be no copyright in a book the publication of which is illegal on the ground of immorality, indecency, sedition, or blasphemy (*y*); and it appears that copyright will not be recognized in a mere title or name (*z*).

Copyright in articles contributed to encyclopædias, magazines or other periodical publications is especially regulated by s. 18 of the Act, which provides that the copyright therein shall on payment be the property of the proprietor of the publication for twenty-eight years, and that from that time the right of publishing the articles in a separate form shall revert to the author for the remainder of the period given by the Act.

Lectures,
5 & 6 Will. IV.
c. 65.

It was held in *Abernethy v. Hutchinson* (*a*), that a lecturer is entitled to copyright in lectures delivered to his pupils. Such delivery to a private audience is distinguished from a public address (*b*). Special protection is afforded to the rights of lecturers under certain conditions by statute (*c*).

Private
letters.

As to private letters, generally speaking the writer may restrain their publication by the person to whom they are addressed, or by any third party (*d*), and the person receiving a letter may restrain its publication by a stranger (*e*).

(*s*) *Kelly v. Hooper*, 4 Jur. 21.
(*t*) *Longman v. Winchester*, 16 Ves. 269.

(*u*) *Walter v. Howe*, 17 Ch. D. 708; 44 & 45 Vict. c. 60.

(*x*) *Hotten v. Arthur*, 1 H. & M. 603; *Grace v. Newman*, 19 Eq. 624; *Ager v. P. & O. Co.*, 26 Ch. D. 637.

(*y*) *Stockdale v. Onwhyn*, 5 B. & C. 173; *Walcot v. Walker*, 7 Ves. 1; *Southey v. Sherwood*, 2 Mer. 435.

(*z*) *Dicks v. Yates*, 18 Ch. D. 76; *Kelly v. Byles*, 13 ib. 682; *Schove v. Schminke*, 33 ib. 546; but see also *Weldon v. Dicks*, 10 ib. 247.

(*a*) 1 H. & Tw. 40.

(*b*) *Caird v. Sime*, 12 App. C. 326.

(*c*) 5 & 6 Will. IV. c. 65.

(*d*) *Pope v. Curl*, 2 Atk. 342; *Gee v. Pritchard*, 2 Swanst. 402.

(*e*) *Granard v. Dunkin*, 1 Ba. & Be. 207; *Thompson v. Stanhope*, Amb. 737.

But these rights are liable to be qualified by considerations of public policy, or by some personal equity (*f*). The publication of unpublished manuscripts may clearly be restrained by the persons to whom they belong (*g*).

(2.) It is not possible here to do more than cursorily glance at the wide and intricate subject of the infringement of copyright; neither is it possible to indicate by general expressions what amounts to an infringement. A subsequent writer may, of course, make references to and quotations from a prior publication; but he may not do so to such an extent as to sensibly diminish the value of the original (*h*). The question is whether a material and substantial part of the prior work has been taken (*i*), and it is evident that the solution of this will often be extremely difficult. Especially is this the case where the pirated work is, like a calendar or directory, compiled from materials open to every one. In such cases similarity approaching almost to identity is inevitable, and almost the only means by which the fact of piracy can be sustained is by showing a community of errors. A *bonâ fide* abridgment of a book is not piracy (*k*); but here again the difficulty is great in drawing the line between good and bad faith. The tendency of modern decisions is to restrict rather than to extend the latitude allowed in some of the earlier cases in this respect (*l*).

(3.) Copyright in dramatic and musical pieces differs in many respects from purely literary copyright. Literary copyright extends only to the multiplication of copies, but this being an insufficient protection for dramatic authors and composers, restrictions on public representation and performance have been provided in addition by 3 & 4

(*f*) *Percival v. Phipp*, 2 V. & B. 19; *Drew*, Inj. 208, 209.

(*g*) *Queensberry v. Shebbeare*, 2 Eden, 329; *Prince Albert v. Strange*, 1 Mac. & G. 25.

(*h*) *Scott v. Stanford*, 3 Eq. 718.

(*i*) *Chatterton v. Cave*, 3 App. Ca. 483; 2 C. P. D. 42.

(*k*) *Newbery's Case*, Loftt, R. 775; *Dickens v. Lee*, 8 Jur. 184; *Chatterton v. Cave*, *sup.*

(*l*) *Tinsley v. Lacy*, 1 H. & M. 747; *Dickens v. Lee*, *supra*.

3 & 4 Will. IV. c. 15.
 5 & 6 Vict. c. 45.
 45 & 46 Vict. c. 40.

Will. IV. c. 15, 5 & 6 Vict. c. 45, and 45 & 46 Vict. c. 40; and the first public representation or performance is, in respect of such works, equivalent to publication. Public representation or performance of such a work, or of a material and substantial part thereof, amounts to an infringement of the copyright (*m*). Penalties are by statute (*n*) imposed for such infringements; but none the less an injunction may be obtained to restrain an intended infringer (*o*).

Copyright in
 prints, &c.

(4.) Copyright in prints, engravings and etchings depends on the statutes 8 Geo. II. c. 13, 7 Geo. III. c. 38, and 17 Geo. III. c. 57. The protection has been extended to sculpture by 54 Geo. III. c. 56; to lithographs by 15 & 16 Vict. c. 12, s. 14, and to original paintings, drawings and photographs by 25 & 26 Vict. c. 28 (*p*). Every copy of such works which come so near to the original as to give the same idea created by the original is an infringement (*q*), and this includes any copy made by photography or other chemical process (*r*).

Copyright in
 designs for
 ornament,

(5.) Copyright in designs for ornament is regulated by 5 & 6 Vict. c. 100, 6 & 7 Vict. c. 65, 13 & 14 Vict. c. 104, 21 & 22 Vict. c. 70, and 24 & 25 Vict. c. 73; the duration of the protection differing according to the articles protected (*s*). A design within these statutes need not necessarily be a new invention; a combination of old materials may be protected if the design be new (*t*).

and designs
 for utility.

Designs for utility are protected by 6 & 7 Vict. c. 65, 13 & 14 Vict. c. 104, and 46 & 47 Vict. c. 57, and have reference to the shape or configuration of an article as con-

(*m*) *Reade v. Lacy*, 1 J. & H. 524; *Chatterton v. Cave*, 3 App. Ca. 483; 2 C. P. D. 42. See *Chappell v. Boosey*, 21 Ch. D. 232.

(*n*) 3 & 4 Will. IV. c. 15.

(*o*) *Russell v. Smith*, 15 Sim. 181.

(*p*) See *Noitige v. Jackson*, 11 Q. B. D. 627.

(*q*) *West v. Francis*, 5 B. & Ald.

743; *Moore v. Clark*, 9 M. & W. 692.

(*r*) *Gambart v. Bull*, 14 C. B. N. S. 306; *Graves v. Ashford*, 2 L. R. C. P. 410.

(*s*) See *Grave's Case*, 4 L. R. Q. B. 715.

(*t*) *Holdsworth v. Macrae*, 2 L. R. H. L. 380.

ducive to its utility. The statutes do not apply to a combination of old designs, or to inventions or new applications, however useful; except in so far as the shape and configuration confer utility upon the invention (*u*).

The foregoing very general descriptions must here suffice to indicate the nature of the various species of copyright. For further details, and in particular as to the question of international copyright (*x*), reference should be made to works specially devoted to the subject.

(6.) The proprietor of a copyright cannot, generally speaking, maintain an action in respect of the infringement of his right, until his copyright has been registered (*y*); and he can obtain no injunction until the defendant's work has been published (*z*). It is not, however, necessary that he should show a clear legal title. A fair *prima facie* title, or a clear colour of title, legal or equitable, is sufficient, even though limited in point of time or extent (*a*).

Action, when maintainable.

Registration.

Prima facie title sufficient.

Delay or acquiescence, unless adequately explained, will be fatal to the claim (*b*), as also will participation in the conduct complained of (*c*). Under 5 & 6 Vict. c. 45, s. 26, all actions must be commenced within twelve months of the offence.

Plaintiff must be diligent.

The injunction may be granted against the whole or a part of the work, according to the extent of the piracy (*d*); the whole will be included if the pirated part is so intermixed with the original matter as to be practically inseparable (*e*). In copyright, as in patent cases, an interlocutory injunction if granted usually determines the action. The plaintiff is, however, entitled to a perpetual injunction, and this will be decreed with costs at the hearing, unless the

Nature of the injunction.

(*u*) *Rogers v. Driver*, 16 Q. B. 102.

(*x*) See now 49 & 50 Vict. c. 33.

(*y*) See 5 & 6 Vict. c. 45, s. 24, and the various other statutes referred to. *Walter v. Howe*, 17 Ch. D. 708.

(*z*) *Morris v. Wright*, 5 Ch. 279.

(*a*) *Univ. of O. & C. v. Richardson*, 6 Ves. 689; *Nichol v. Stockdale*, 3 Swanst. 687.

(*b*) *Mawman v. Tegg*, 2 Russ. 393.

(*c*) *Rundell v. Murray*, Jac. 311.

(*d*) *Lewis v. Fullarton*, 2 Beav. 6.

(*e*) *Mawman v. Tegg*, *sup.*; *Kelly v. Morris*, 1 Eq. 697.

defendant has submitted to the interlocutory injunction, and offered to pay the costs up to that time (*f*).

Discovery.

Whatever relief is required by the plaintiff, as incident to the right to an injunction, may be decreed to him. Thus, he may have discovery of the original sources from which the defendant alleges that he has taken his work (*g*).

Account.

A right to an account of profits is also incident to the injunction (*h*). By statute the plaintiff is also entitled to delivery up of all copies of the defendant's work (*i*).

In deciding the question of piracy, the Court now usually inspects the work itself (*k*).

3. Trade marks.

A third species of right, for the protection of which the remedy of injunction is peculiarly suitable, is that to the exclusive use of a trade mark. Apart from the provisions of the recent statutes which now regulate the law as to trade marks, the following principles were established for the protection of vendors and the public.

General principles of trade marks.

(1.) No man has a right to sell his goods as being the goods of another manufacturer or trader. If, therefore, some particular mark or symbol has come to be recognised in trade as the mark of the goods of a particular person, another person cannot lawfully mark his goods with that mark so as to induce a purchaser to believe that they are the goods of the person entitled to use the mark (*l*). The right is limited to the use of the mark in connexion with a particular class of goods; that is to say, it would be no infringement to mark goods of a different class with the same symbol (*m*). Moreover, if an article has acquired a certain name in the market, which name indicates its nature rather than its being of a particular

(*f*) *Millington v. Fox*, 3 My. & Cr. 352.

(*g*) *Kelly v. Wyman*, 17 W. R. 399.

(*h*) *Baily v. Taylor*, 1 R. & M. 73; *Colburn v. Simms*, 2 Ha. 560.

(*i*) 5 & 6 Vict. c. 45, s. 23; *Macrae v. Holdsworth*, 2 De G. & S. 497.

(*k*) *Lewis v. Fullarton*, 2 Beav. 6.

(*l*) *Perry v. Truefitt*, 6 Beav. 66.

(*m*) *Edelsten v. E.*, 1 De G. J. & S. 185.

manufacture, any man may call it by that name, though in the first place it may have been the name of the inventor or original maker (*n*).

(2.) Any name, symbol, or emblem which is not merely descriptive of an article, or which does not denote the general character of a business, may constitute a trade mark (*o*). No person other than the original inventor, or those claiming through him, may use such words as "the original" or "the only genuine" as a trade mark (*p*); but a man cannot be prevented from calling goods by his own name merely because some one of the same name invented the goods or made them before him (*q*). The same principle applies in the case of a partnership name, if the use of the name be *bonâ fide*; but the Court will not suffer a name to be used for the purpose of having the benefit of the reputation which another firm has acquired. This amounts to a fraud on the public (*r*).

(3.) By the Patents, Designs and Trade Marks Act, 1883 (*s*), which repealed and amended the previous Registration Acts (*t*), registration of a trade mark is required before proceedings to prevent its infringement can be instituted. But trade marks in use prior to the 13th of August, 1875 (the date of the first Registration Act), are excepted. This statute enacts that a trade mark must consist of or contain at least one of the following particulars:—(1.) A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner. (2.) A written signature or copy thereof. (3.) A distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use (*u*).

(*n*) *Hall v. Barrows*, 4 De G. J. & S. 150; *Bury v. Bedford*, *ib.* 352.

(*o*) *Braham v. Bustard*, 1 H. & M. 447; *Burgess v. B.*, 3 De G. M. & G. 896; *Raggett v. Findluter*, 17 Eq. 29.

(*p*) *Cocks v. Chandler*, 11 Eq. 449; *James v. J.*, 13 Eq. 425.

(*q*) *Burgess v. B.*, *sup.*

(*r*) *Croft v. Day*, 7 Beav. 84; *Singer, &c. v. Wilson*, 2 Ch. D. 453; *Massam v. Thorley's, &c. Co.*, 14 Ch. D. 748.

(*s*) 46 & 47 Vict. c. 57.

(*t*) 38 & 39 Vict. c. 91; 39 & 40 Vict. c. 33.

(*u*) S. 64. See *Wood v. Lambert*, 32 Ch. D. 247; *Re Price's Pat. Candle Co.*, 27 *ib.* 681.

What
amounts to
imitation.

(4.) As to what amounts to colourable imitation or infringement, reference may be made to *Leather Cloth Co. v. American Cloth Co.* (x), *Seizo v. Provizende* (y), and the cases therein cited. Almost all that can be laid down respecting this question in general terms is that the resemblance must be such as to deceive an ordinary purchaser; it is sufficient if it be calculated to deceive even the unwary; and it is not incumbent on the plaintiff to show that any one has been actually deceived (z). On the other hand, it has been held that the fact of one person having been actually deceived is not conclusive proof of an improper imitation (a). Each case must be judged on its own merits. Under the present statute, an innocent user of a protected mark amounts to an infringement (b).

Remedies.

(5.) Incident to the remedy of injunction in cases of infringement is the right to an account of the profits made by the illegal user (c). An innocent vendor of goods spuriously marked is, however, not liable to an account, except in respect of sales made after he has acquired knowledge of the wrong (d). A plaintiff must, in these as in other cases, be prompt in his application after discovery of the infringement. Delay or acquiescence may be held to bar his right to an injunction (e).

4. Goodwill.

Goodwill.

The remedy of injunction has often been sought for the protection of rights arising from the sale or assignment of the goodwill of a business. It is now decided that, in the absence of an express agreement to that effect, a vendor of a business is not to be restrained from soliciting his former customers (f); and *à fortiori*, is this the case if the sale is not voluntary, but compulsory, as in the case of the ven-

(x) 11 H. L. 523.

(y) 1 Ch. 192.

(z) *Johnson v. Orr-Ewing*, 7 App. C. 219.

(a) *Civil Service Supply Ass. v. Dean*, 13 Ch. D. 512.

(b) *Upmann v. Forester*, 24 Ch. D. 231.

(c) *Burgess v. Hills*, 26 Beav.

244.

(d) *Moet v. Couston*, 33 Beav. 578.

(e) *Motley v. Downman*, 3 My. & Cr. 1; *Lee v. Haley*, 5 Ch. 155, 160.

(f) *Pearson v. P.*, 27 Ch. D. 145, overruling *Labouchere v. Dawson*, 13 Eq. 322; *Vernon v. Hallam*, 34 Ch. D. 748.

dor's bankruptcy (*g*). But if the vendor bargains expressly not to interfere with the customers, or otherwise binds himself by contract not to carry on business so as to interfere with the purchaser, his negative contract may be enforced by injunction (*h*). Such contracts must conform to the rules of law respecting contracts in restraint of trade, or they will be void, as opposed to public policy (*i*). A full discussion of the scope of these rules may be found in the notes to *Mitchel v. Reynolds*, in Smith's Leading Cases (*k*), to which reference should be made.

Such cases are, of course, quite distinct from those in which it is sought to restrain a fraudulent use of a trade name. The Court has ample jurisdiction to protect the public from deception, and merchants or manufacturers from injury, by the use of merely colourable imitations of the names of individuals or firms (*l*). A trader may, however, in describing his own wares, make reference to a rival's name, provided he takes proper measures to obviate any reasonable possibility of mistake or deception (*m*). And, to entitle a plaintiff to an injunction, he must show not only the possibility of public deception, but also the probability of injury to himself (*n*).

(*g*) *Walker v. Mottram*, 19 Ch. D. 355.

(*h*) *Whittaker v. Howe*, 3 Beav. 683; *Baines v. Geary*, 35 Ch. D. 154.

(*i*) *Homer v. Ashford*, 3 Bing. 322.

(*k*) 1 Sm. L. C. 417.

(*l*) *Massam v. Thorley's Cattle Food Co.*, 14 Ch. D. 748; 6 *ib.* 574; *Metzler v. Wood*, 8 *ib.* 606.

(*m*) *Singer Manufacturing Co. v. Loog*, 8 App. Ca. 15; 18 Ch. D. 395.

(*n*) *Borthwick v. The Evening Post*, 37 Ch. D. 449.

CHAPTER VIII.

INSTANCES OF JURISDICTION ANALOGOUS TO INJUNCTION.

- I. *Cancellation and Delivery up of Documents.*
 - II. *Actions to establish Wills.*
 - III. *Actions Quia Timet.*
 - IV. *Actions in the nature of Bills of Peace.*
 - V. *Writ of Ne Exeat Regno.*
 - VI. *Actions to perpetuate Testimony.*
-

I. *Cancellation and Delivery up of Documents.*

Grounds of
the jurisdic-
tion.

COURTS of equity have long been wont to entertain suits which seek the cancellation, rescission, or delivery up of instruments, when there is a danger of their being improperly employed for the injury of the plaintiff.

It often happens that agreements, securities, or deeds which have answered the purposes for which they were created, or which are voidable or even entirely void, have nevertheless an appearance of validity, and may therefore be used by an ill-disposed person for purposes of annoyance, vexation, and fraud. In such circumstances, no preventive remedy could be obtained at law, and a useful field was accordingly left for the peculiar jurisdiction of equity (*a*).

Remedy dis-
cretionary.

It is apparent that the relief sought in such cases bears some resemblance to that of Specific Performance; and as in that case, so in this, the exercise of the jurisdiction is eminently a matter within the discretion of the Court. A

(*a*) Story, 692.

decree cannot be demanded as a matter of right; the Court will consider all the circumstances of the case, and impose such conditions as it thinks fit (*b*). It remains to consider in what cases, and under what circumstances, equity will grant the relief desired.

There are three classes of instruments to be particularly considered: First, those which are utterly void; secondly, those which are voidable; thirdly, those which are in themselves unexceptionable, but to which the plaintiff has a title as against the defendant.

1. As to void instruments, it was at one time questioned whether Courts of equity ought to interfere to procure their cancellation or delivery up. It was argued against the jurisdiction, that such instruments being of no effect at law, there was no necessity for any equitable interference respecting them; and further, that if an equitable remedy was needed, the proper course would be the issuing of a perpetual injunction against the use of the instrument (*c*).

On the other hand, more recent cases have proceeded on the principle that if there is a real danger that such an instrument may be injuriously used, that alone supplies sufficient ground for equitable interference (*d*).

The question whether the Court would or would not interfere, therefore, resolved itself into the question whether the instrument was of such a nature as to admit of injurious use. If so, it would be ordered to be delivered up; if not, equity would not interpose.

If, then, the illegality of the instrument, whether agreement, security, or deed, is apparent on the face of it, so that its nullity can admit of no doubt, there is no sufficient ground for seeking equitable assistance respecting it. Such a document is plainly innocuous; no lapse of time can add to its power so as to render it dangerous. Illus-

When granted.

1. Void instruments.

Relief granted unless illegality is apparent on their face.

Not if it is so.

(*b*) Story, 693; *Goring v. Nash*, 3 Atk. 188.

3 Bro. C. C. 15, 16.

(*c*) Story, 698; *Hilton v. Barrow*, 1 Ves. jr. 284; *Ryan v. Mackmath*,

(*d*) Swanston's note to *Davis v. D. of Marlborough*, 2 Swanst. 157.

trations are supplied by instruments which on their face disclose an illegal consideration, or the fact that they have been fully satisfied (*e*). Equity, which will do nothing which is useless, will not interfere in such cases.

Cases in which equity has granted relief.

Where, however, an instrument, though in fact void, has an appearance of validity, the case is otherwise. Then there exists a material danger against which protection may reasonably be sought. Thus, a deed purporting to convey hereditaments, as long as it remains in hostile hands, has a tendency to throw a cloud on the title (*f*); a mere written agreement may be used vexatiously and improperly (*g*); and in such cases lapse of time only adds to the danger, by rendering it more difficult to procure the evidence necessary to expose the fraud (*h*). In all such cases equity considers it against conscience for a party to hold or retain the mischievous document, and its jurisdiction to order delivery up and cancellation is well established. Forged instruments have similarly been held to be delivered up, without any prior trial at law as to the forgery (*i*).

Voidable instruments.

2. As to voidable instruments, it is not now necessary to repeat what has already been said under the headings of Fraud and Mistake respecting the circumstances which will give a person the option of avoiding his own acts. The present question has a close connexion with what was there stated, and referring thereto, it may be briefly answered—

Equity will set aside and cancel a voidable agreement or security :—

Cancelled on ground of fraud in defendant.

(1.) When the defendant has been guilty of actual fraud, in which the plaintiff has not participated.

(*e*) *Simpson v. Howden*, 3 My. & Cr. 97; *Smyth v. Griffin*, 13 Sim. 245; *Threlfall v. Lunt*, 7 Sim. 627.

(*f*) *Pierce v. Webb*, 3 Bro. C. C. 16; *Byne v. Fivian*, 5 Ves. 607; *Bond v. Walford*, 32 Ch. D. 238.

(*g*) *Bromley v. Holland*, 7 Ves. 20.

(*h*) *Kemp v. Prior*, 7 Ves. 248.

(*i*) *Peake v. Highfield*, 1 Russ. 559; *Johnston v. Renton*, 9 Eq. 181; *Cooper v. Vesey*, 20 Ch. D. 612.

This is the simplest and clearest case, plainly conformable to the elementary rule that a man shall not be allowed to reap an advantage from his own fraud against one who is innocent.

(2.) Where the plaintiff, as well as the defendant, has in some degree participated in the fraud, but they are not *in pari delicto*.

It is a general maxim that "*he who comes into equity must come with clean hands*"; and as a rule no relief will be given to one who has been guilty of any unconscientious dealing respecting the subject-matter of the suit. But if a fraud has been committed by the defendant, and participated in by the plaintiff, yet if the plaintiff acted under the influence of oppression, imposition, hardship, or other undue influence, such as may arise from great inequality between the ages and conditions of the parties, he may succeed in establishing his claim to relief (l).

Plaintiff must be innocent, or not *in pari delicto*.

(3.) If the transaction has been in effect a fraud upon public policy.

Relief on grounds of public policy. Even though plaintiff has participated.

In these cases, as in those last mentioned, relief may be given notwithstanding the participation of the plaintiff in the fraud; the reason in this case is that public policy would be defeated by allowing the transaction to stand. Thus, gaming securities have on this ground been decreed to be given up (m), and other agreements founded on immoral considerations cancelled (n).

Save, however, in these two exceptional cases, equity will peremptorily refuse its assistance to one who has himself been guilty of fraud, whether actual or constructive (o).

3. Lastly, we have to consider those cases in which the plaintiff seeks the delivery up of an instrument not on the ground of any equity arising out of the nature of the instrument itself, but because he has an equitable right as

Valid instruments.

Relief on ground of title.

(l) *Osborne v. Williams*, 18 Ves. 379; *Bosanquet v. Dashwood*, Ca. t. Talb. 37, 40, 41.

(m) *Mulltown v. Stewart*, 3 My. & Cr. 18.

(n) *W. v. B.*, 32 Beav. 574.

(o) *Franco v. Bolton*, 3 Ves. 386; *St. John v. St. J.*, 11 *ib.* 535; *Ayerst v. Jenkins*, 16 Eq. 275.

against the defendant to its possession or custody. In these cases there is of course no question as to cancellation; the relief sought is simply delivery up.

A person is entitled to the title deeds of his own property; thus, heirs-at-law, devisees, and other persons properly entitled to the custody and possession of the title deeds of their property may come into equity and obtain a decree for the specific delivery of them (*p*); and the same doctrine applies to other instruments, such as bonds, negotiable instruments, &c., which are detained from persons who have a legal or equitable interest in them (*q*).

In such cases the Courts of common law could not afford complete redress, since the prescribed forms of their remedies rarely enabled them to pronounce a judgment *in rem*.

Preservation
of deeds.

Similarly, remaindermen and reversioners, and other persons having limited or ulterior interests in real estate, may in many cases take measures in equity to secure the preservation of their title deeds (*r*). The plaintiff must, however, in such cases be prepared to show the necessity for his action by proving that there is some danger of the loss or destruction of the instruments unless protected by the Court, and his interest must not be too remote (*s*).

Voluntary
settlements
not relieved
against.

It may be here observed that voluntary agreements untainted with fraud, although not enforceable in equity, will not be set aside. Unless such a deed reserves a power of revocation, the settlor will be bound thereby (*t*), and the fact that such a deed contains no power of revocation is not sufficient to render it voidable (*u*).

(*p*) *Reeves v. R.*, 9 Mod. 128;
Tanner v. Wise, 3 P. Wms. 296;
Cooper v. Vesey, 20 Ch. D. 612;
Manners v. Mew, 29 *ib.* 725.

(*q*) *Kaye v. Moore*, 1 S. & S. 61;
Freeman v. Fairlie, 3 Mer. 30.

(*r*) *Smith v. Cooke*, 3 Atk. 382;
and see *Jenner v. Morris*, 1 Ch. 603;

Stanford v. Roberts, 6 Ch. 307.

(*s*) *Ivie v. I.*, 1 Atk. 431; *Ford v. Peering*, 1 Ves. jr. 76.

(*t*) *Villiers v. Beaumont*, 1 Vern. 101; *Bill v. Cureton*, 2 My. & K. 503.

(*u*) *Henry v. Armstrong*, 18 Ch. D. 668.

II. *Actions to establish Wills.*

In considering the equitable jurisdiction to establish wills, the student must carefully observe two things: first, the distinction between the juristic effects of wills of personalty and wills of realty; secondly, the distinction between disputes as to the validity and disputes as to the construction of wills.

1. A will of personal property requires for its effectual performance the appointment of a legal personal representative. Usually the will itself provides for this by the appointment of one or more executors. If not, or if those appointed are incapable, the Court supplies the vacancy by the appointment of an administrator. If the will is in other respects valid, the administrator *cum testamento annexo* acts in conformity therewith as an executor. The *persona* of the testator devolves in a measure upon him; he is liable for the debts; the general personalty vests in him, and only passes to the beneficiaries by his consent.

Will of personalty requires legal personal representative,

in whom the property vests.

A will of real property, on the other hand, is in effect a conveyance. Putting aside for the present the various steps by which it has become liable to debts, and in some respects placed within the power of the executors, the will itself may be regarded as an assignment of the real estate to the devisee or devisees named.

Will of real property is a conveyance to the devisee.

A will of personalty, again, is ineffectual until it is proved in the proper Court, and administration granted to the personal representative. A will of realty does not require any such proof, and is of full effect though no personal representative at all be appointed.

Former must be proved, latter not so.

2. The second distinction needs only to be stated. It is evident that the question whether a certain document is or is not a will is quite distinct from the question as to what its language means.

Distinction between disputes as to validity and as to construction.

When we speak of the jurisdiction of Courts of equity over wills, we refer to the former of these questions. The

construction of wills is a matter in which they are continually concerned, and which has already come largely under our consideration in connection with the administration of assets.

No general jurisdiction in Chancery as to validity of wills;

Previous to the Judicature Acts the Court of Chancery had no general jurisdiction as to the validity of wills. As regards wills of personal property, the Court of Probate, which by virtue of 20 & 21 Vict. c. 77, succeeded in 1857 to the functions of the Ecclesiastical Court, was the proper forum; and the same Court at the same time acquired jurisdiction as to wills of real property, which was formerly exercised by the Courts of Common Pleas and Queen's Bench.

not even in cases of fraud.

The position of the Court of Chancery with respect to wills is well illustrated by the case of *Allen v. M^rPherson* (*v*), in which it was sought to set aside a will of personalty by suit in equity on the ground of undue influence, notwithstanding that it had been admitted to probate in the Ecclesiastical Court; but the bill was dismissed for want of jurisdiction. A similar decision has been much more recently arrived at in a case in which both real and personal property were concerned (*x*). It has indeed been held under the Judicature Acts that the Chancery Division has now concurrent jurisdiction with the Probate Division to grant probate of wills (*y*); but the same cases show that it is most unlikely to put this power into exercise.

But, notwithstanding these considerations, and previous to the Judicature Acts, the cases were numerous in which a qualified jurisdiction respecting wills was exercised by Courts of equity.

Incidental jurisdiction before Jud. Acts.

In the first place, if a will came incidentally before the Court, and its validity had not been admitted or elsewhere established, the Court effectually determined the question.

(*v*) 1 H. L. 191.
(*x*) *Meluish v. Milton*, 3 Ch. D.
27.

(*y*) *Pinney v. Hunt*, 6 Ch. D. 101;
Bradford v. Young, 26 *ib.* 656; and
see *Priestman v. Thomas*, 9 P. D.
70, 210.

This was done either by directing an issue to be tried at law, or by the production and examination of witnesses in the Court of equity itself; and when the validity of the will was thus once determined, the rights of those claiming under it might be established, if necessary, by a perpetual injunction against the heir (z).

Secondly, as regards wills purely of real estate, which require neither the appointment of an executor, nor a grant of probate, equity had, and seemingly still has, jurisdiction to entertain a suit by a devisee to establish his right against the heir, by means of a perpetual injunction restraining him from contesting its validity in future (a). Such action could not have been brought at law, and yet might be necessary for the security of the devisee; since the heir might delay seeking ejectment against him until the evidence was grown obscure. The jurisdiction, therefore, is in some respects analogous to that which empowers interference *quia timet* (b).

Wills of pure real estate established in equity.

A leading authority respecting actions of this nature is *Boyse v. Rossborough* (c), where a will was established at the suit of a devisee against an heir, although the heir had brought no ejectment against the devisee, although no trusts were declared by the will, and although there was no necessity for the administration of the estate by the Court. It has also been held that the Court has power to establish such a will not only against the heir, but against all persons setting up adverse claims—for instance, claims depending on a prior will (d).

Boyse v. Rossborough.

On the other hand, an heir, having a complete legal remedy by action of ejectment, could not have come into equity as plaintiff to contest the validity of a will, except, at least, by consent of the devisee. Under the present

Heir cannot sue to contest a will.

(z) *Sheffield v. D. of Buckinghamshire*, 1 Atk. 628.

(a) *Bootle v. Blundell*, 19 Ves. 494, 509.

(b) *Infra*, p. 752.

(c) *Kay*, 71; 1 K. & J. 124; 3 De G. M. & G. 817; 6 H. L. 1.

(d) *Ibid.*; *Lovett v. L.*, 3 K. & J. 1.

practice, these distinctions between the jurisdiction of Courts of law and equity have, of course, ceased to exist.

The combined result of legislation and decision, therefore, practically confines the jurisdiction to establish wills to a very limited number of cases—namely, to wills relating solely to real property.

III. *Actions Quia Timet.*

In certain circumstances equity has jurisdiction to interfere for the protection of a right before any injury has been actually done, and a party who fears a probable invasion of his right may establish an action for his protection without claiming any other relief.

Nature of
relief given
quia timet.

The nature of the relief given depends, of course, upon the circumstances under which it is sought; sometimes it takes the form of the appointment of a receiver of rents or other income; sometimes that of an order to pay a fund into Court; sometimes security is directed to be given; sometimes it suffices merely to issue an injunction (*e*).

The object of the action in all cases is to preserve property to its appropriate uses and ends. It must here suffice to adduce a few illustrations of the circumstances which call for and warrant the exercise of the jurisdiction.

Preservation
of trust pro-
perty.

1. If property in the hands of a trustee is in danger of being diverted or squandered, to the injury of any claimant having a present or prospective title thereto, the Court will take such measures for its protection as it deems requisite. And the same principle applies to executors or administrators, if there is danger of collusion between them and the debtors of the estate, or of a waste of the estate from any other cause (*f*). Such cases will generally be met by the appointment of a receiver; and when this

Appointment
of receiver.

(*e*) Story, 826; *Hendriks v. Montague*, 17 Ch. D. 638.

(*f*) Story, 827, 828; *Taylor v. Allen*, 2 Atk. 213.

is done the appointment is made for the benefit of all the parties in interest, and not for that of the plaintiff only (*g*).

The appointment of a receiver rests in the discretion of the Court; and when appointed he is regarded as an officer of the Court, and therefore subject to its orders (*h*): he is required to give security.

2. Where the tenants of a particular estate for life or in tail neglect to keep down the interest due upon incumbrances, the Court often appoints a receiver to secure the performance of this duty (*i*). Keeping down incumbrances.

3. The jurisdiction is also exercised for the protection of sureties. A surety who apprehends loss from the delay of his creditor to sue the principal debtor may come into equity to compel the discharge of the debt (*k*). Protection of sureties.

4. In all cases in which there is a future right of enjoyment of personal property, and there is danger of loss or deterioration or injury to it in the hands of the party entitled to present possession, equity has power to interpose, and grant relief on an action in the nature of a bill *quia timet* (*l*). Such cases may be met by an order to give security (*m*); or, still more effectually, by requiring the fund to be paid into Court (*n*). Whenever trust money is traced to hands not entitled to hold it, the Court will, on the application of the *cestuis que trusts*, order its payment into Court (*o*). Protection of future rights in personalty.
Security.
Payment into Court.

It is, of course, unnecessary here to dwell upon the circumstances which warrant the granting of injunctions for the protection of property, these having been already copiously illustrated. In order to claim an injunction *quia timet* the plaintiff, as in the case of injunctions against Injunctions.

(*g*) *Davis v. D. of Marlborough*, 1 Swanst. 83; 2 *ib.* 125.

(*h*) *Skip v. Harwood*, 3 Atk. 561.

(*i*) *Giffard v. Hart*, 1 S. & L. 407, n.

(*k*) *Wright v. Simpson*, 6 Ves. 734; and see *Wooldridge v. Norris*, 6 Eq. 410; *Hughes-Hallett v. Indian*,

Sec., Co. 22 Ch. D. 561.

(*l*) Story, 845.

(*m*) *Rous v. Noble*, 2 Vern. 249.

(*n*) *Slanning v. Style*, 3 P. Wms. 336.

(*o*) *Leigh v. Macaulay*, 1 Y. & C. Ch. 260; *Bowsher v. Watkins*, 1 R. & M. 277.

Jud. Act.
1873, s. 25,
sub-s. 8.

legal wrongs generally, must show either that substantial danger is imminent, or that the threatened injury will, if it happens, be irreparable (*p*). We need only further observe that the same authority, above quoted, which now enables the Court to grant an injunction by an interlocutory order whenever it seems to be just or convenient, enables it to appoint a receiver in a similar manner and on similar conditions (*q*). This extensive power renders it now unnecessary to consider many restrictions on the jurisdiction which were formerly effective.

IV. *Actions in the nature of Bills of Peace.*

In some respects analogous to the remedy last considered is that formerly known as a bill of peace, and now taking the form of an action of the same effect as the former bill.

Nature of
bills of peace.

A bill of peace was one brought to establish and perpetuate a right which from its nature might be controverted by different persons at different times, and by different actions; or where separate attempts had already been made to overthrow the same right, and justice required that the party should be quieted in the right and relieved from the annoyance of continual litigation. In such cases equity, which is always opposed to multiplicity of suits, has jurisdiction to interfere and put an end to the fruitless litigation.

The right of
one esta-
blished
against many
defendants.

One class of cases in which this remedy is appropriate consists of those in which one general right is to be established against a great number of persons, as where a person has possession and claims a right of fishery on a river, and the riparian proprietors set up several adverse

(*p*) *Fletcher v. Bealey*, 28 Ch. D. 688.

(*q*) Jud. Act, 1873, s. 25, sub-s. 8.

rights (*r*); or where a lord seeks to restrain encroachments by tenants under colour of a common right, or to establish an enclosure which he has approved under the Statute of Merton (*s*).

Similar relief may be sought where many persons claim or defend a right against one; as where tenants seek to prevent the disturbance by a lord of a common right (*t*). The right of many against one.

But in order to entitle a party to claim the assistance of the Court on these grounds, it must be clear that there is a right claimed which affects many persons, and a suitable number of parties in interest must be brought before the Court (*u*); and it is to be observed that the Court will not decree a perpetual injunction in contradiction of a public right, such as a right to a highway or to a common navigable river (*r*). On the one hand, the right in question must affect numerous parties; on the other, it must not affect the public at large. Conditions of the remedy.

Another class of cases for which a bill of peace was an apt remedy, comprised those in which the plaintiff had after repeated trials established his legal right, but yet was threatened with further litigation from new attempts to controvert it. In such circumstances, the Court was wont to grant a perpetual injunction to quiet the plaintiff's possession, and to suppress future litigation (*x*). It would not, however, interfere until the right had been satisfactorily established at law; but two trials were deemed a sufficient determination of the right to warrant an injunction (*y*). By 25 & 26 Vict. c. 42, the Court of Chancery was Protection of rights well established at law.
Rolt's Act.

(*r*) *M. of York v. Pilkington*, 1 Atk. 282; *Tenham v. Herbert*, 2 *ib.* 483.

(*s*) 20 Hen. III. c. 4; *Hanson v. Gardiner*, 7 Ves. 305; *D. of Norfolk v. Myers*, 4 Mad. 50, 117.

(*t*) *Conyers v. Abergavenny*, 1 Atk. 285; *Phillips v. Hudson*, 2 Ch. 243.

(*u*) Story, 857; *Cowper v. Clerk*,

3 P. Wms. 15.

(*v*) Story, 858; *Hilton v. Scarborough*, 2 Eq. Ca. Ab. 171.

(*x*) *E. of Bath v. Sherwin*, Prec. Ch. 261; 10 Mod. 1; 4 Bro. P. C. 373.

(*y*) *Devonsher v. Newenham*, 2 S. & L. 208; *Leighton v. L.*, 1 P. Wms. 671.

Jud. Act.

empowered to direct an issue, if necessary, to be tried at the assizes or at *nisi prius*, or to itself decide the question of law or fact: and since the Judicature Acts the Courts of law could themselves apply the remedy without requiring the defendant to appear as a plaintiff in equity. We have already seen, that as regards the various divisions of the High Court of Justice no one division can now restrain proceedings in another. Each can order a stay of its own proceedings whenever there is an equitable claim to it.

V. *Ne Exeat Regno*.

Nature and
origin of the
writ.

The writ of *ne exeat regno* was a prerogative writ, issued to prevent a person from leaving the realm. It was originally applied only for political objects and purposes of state, and at present it is exercised for the protection of private rights with much caution and jealousy (z).

Granted only
for equitable
debts,

The writ *ne exeat regno* was, as a rule, only granted in respect of equitable debts, a plaintiff who had a legal claim being left to his legal remedy. But to this rule there were two exceptions.

except in
cases of
alimony,

First, when alimony had been decreed to a wife the writ was procurable to restrain the husband from evading the obligation by leaving the realm (a). The alimony must, however, have been actually decreed, and not appealed from. The writ could not be obtained while the case was still pending (b).

and where
there is
admitted
balance but
larger sum is
claimed.

Secondly, where there was an admitted balance due from the defendant to plaintiff, but the plaintiff claimed a larger sum, he might be assisted by the writ (c). This case

(z) Story, 1465-7.
(a) *Read v. R.*, 1 Ch. Ca. 115; 173; *Colverson v. Bloomfield*, 29 Ch. D. 341.
Shaftoe v. S., 7 Ves. 71.
(b) *Ibid.*; *Dawson v. D.*, 7 Ves. (c) *Jones v. Samson*, 8 Ves. 593; *Jones v. Alephsin*, 16 Ves. 471.

was brought within the purview of equity by its jurisdiction in matters of account.

With respect to the equitable demands for which the writ might be issued, they were required to be certain as to their nature, and actually and presently payable, not contingent or prospective (*d*). It must also have been a pecuniary demand, and not of the nature of damages or any unliquidated claim (*e*). It need not, however, have been directly created between the parties; thus the *cestui que trust* or obligee of a bond was entitled to the writ against the obligor (*f*). A *cestui que trust* who has a vested interest is entitled to the writ as against his trustee, if he has reason to apprehend that he is going abroad (*g*); but the breach of trust must be brought home to the trustee before he is liable to the process (*h*).

Conditions of
the remedy.

Such were the general conditions of the jurisdiction as unaffected by legislation. At present it seems that its scope is completely determined by the following statutes:

(1.) By the Debtors Act, 1869 (*i*), which, with certain exceptions, abolished imprisonment for debt, it was enacted that in future no person should be arrested upon mesne process in any action, but that where the plaintiff in any action in any of the Courts of law at Westminster, in which previously the defendant would have been liable to arrest, proves at any time before final judgment by evidence on oath to the satisfaction of the judge that the plaintiff has good cause of action against the defendant to the amount of £50, and that there is probable cause for believing that the defendant is about to quit England, and that his absence will materially prejudice the plaintiff in his action, such judge may order the defendant to be arrested and

Debtors Act,
1869.

(*d*) *Anon.*, 1 Atk. 521; *Rice v. Gaultier*, 3 ib. 500.

(*e*) *Etches v. Lance*, 7 Ves. 417; *Cock v. Ravie*, 6 ib. 283.

(*f*) *Grant v. G.*, 3 Russ. 598; *Leake v. L.*, 1 J. & W. 605.

(*g*) *Hawkins v. H.*, 1 Dr. & Sm. 75.

(*h*) See *Re Owens*, 47 L. T. N. S. 61; *Lewin on Trusts*, 900, ed. 8.

(*i*) 32 & 33 Vict. c. 62.

imprisoned for a period not exceeding six months, unless he gives the prescribed security, not exceeding the amount claimed in the action, that he will not go out of England without the leave of the Court.

Effect of the
Act.

With respect to this enactment, it has been held that it has in effect confined the writ of *ne exeat regno* to cases which come within its provisions (*k*), the reasoning being that the jurisdiction of Chancery must follow that of law, and the power of the Courts of law to arrest for legal debts being by this statute restricted, the power of the Courts of equity with respect to equitable debts was subjected to a corresponding restriction. This argument does not seem to have been resorted to in *Sobey v. Sobey* (*l*), in which the writ was issued in the same manner as before the statute (*m*).

Jud. Acts.

(2.) Further, by the Judicature Acts, the distinction between legal and equitable debts has disappeared, so that the reasoning applied by the Master of the Rolls in *Drover v. Beyer* is now much stronger than it would have previously been. It appears from this case, at any rate, that the effect of the Judicature Acts has not been to extend the remedy.

Bankruptcy
Act, 1883.

(3.) It may here be further mentioned, that by the Bankruptcy Act, 1883 (*n*), power is conferred upon the Court of Bankruptcy to issue a similar writ, under the conditions there prescribed, to prevent a debtor from going abroad after the issue of a bankruptcy notice, or presentation of a bankruptcy petition against him.

(*k*) *Drover v. Beyer*, 13 Ch. D. 242.

(*l*) 15 Eq. 200.

(*m*) And see *Lees v. Patterson*, 7 Ch. D. 866.

(*n*) 46 & 47 Vict. c. 52, s. 25.

VI. *Actions to perpetuate Testimony.*

Circumstances often arise in which public justice requires that measures should be taken to perpetuate evidence of a right which cannot be presently protected by judicial decision. For instance, a person may have a claim to a remainder, or he may be in actual possession of the property in question: in neither case can he directly make his right the subject of a judicial decision; and yet his right may be dependent upon evidence which the lapse of time will weaken or perhaps destroy. In such circumstances it is in the highest degree necessary for him that some measures should be taken to secure or perpetuate this evidence, and so to protect him against some adverse claimant, who may be purposely delaying his suit with a view to profit by the loss of the proofs of title.

Grounds of
the jurisdic-
tion.

Such cases strongly appealed to that principle of equity which declares that it will not suffer a wrong without a remedy. And yet the exercise of a jurisdiction thus to perpetuate testimony was evidently subject to the strong objection that the depositions so taken were not published until after the death of the witnesses. The evidence, therefore, was not given under the sanction of the legal penalties attached to perjury. In consequence of the danger thus attending the process, we find that the Courts of equity were careful only to grant relief of this kind in strong cases, where a failure of justice would be otherwise seriously threatened (*o*). Assistance was refused if by any means open to the plaintiff the whole matter could be at once adjudicated upon (*p*). If, as in the illustrations above given, this was impossible, equity would exercise the necessary jurisdiction, and take the requisite evidence (*q*).

Objections
thereto,

and conse-
quent caution
in its exercise.

(*o*) *Angell v. A.*, 1 S. & S. 83.

(*q*) *Spencer v. Peck*, 3 Eq. 415;

(*p*) *Elliee v. Roupell*, 32 Beav. *Re Tayleur*, 6 Ch. 416.

Applicable to
any kind of
property.

It is immaterial, as regards the exercise of the jurisdiction, whether the subject-matter in question is real or personal estate, or of the nature of a mere personal demand, or whether the evidence to be used tends to the proof of the plaintiff's title or is needed for defence (*r*). Equity, however, will do nothing in vain, and it accordingly will not interfere to support a right which is liable to be immediately barred; for instance, it will not entertain an action of this nature by a remainderman against a tenant in tail in possession, who can at any time bar the entail (*s*).

Expectancies.

Formerly, moreover, a mere expectancy, such as that of an heir-at-law, was not deemed sufficient to sustain a bill, though a remote or contingent interest would do so (*s*).

5 & 6 Vict.
c. 69.

But 5 & 6 Vict. c. 69, provided for this case, and extended the remedy by enacting that any person who would under the circumstances alleged by him to exist become entitled upon the happening of any future event to any honour, title, dignity or office, or to any estate or interest in any property, real or personal, the right or claim to which could not by him be brought to trial before the happening of such event, should be entitled to file a bill in Chancery, to perpetuate any testimony which might be material for establishing such claim or right. The terms of this enactment, it will be observed, extend the remedy to claims to titles and dignities; it was previously confined to cases in which the right to some property was in dispute (*u*).

Titles and
dignities.

This statute has since been repealed (*x*); but by O. XXXVII. rr. 35—38, the jurisdiction is continued, and the procedure in suits of this nature is now regulated thereby. Where the validity of a marriage, or legitimacy of a child is in issue, the Court is empowered to entertain

(*r*) Story, 1509; *Suffolk v. Green*, 1 Atk. 450.

(*s*) *Dursley v. Fitzhardinge*, 6 Ves. 261.

(*u*) *Townshend Peerage Case*, 10 Cl. & F. 289; and see *Campbell v. E. of Dalhousie*, 1 L. R. H. L. (Sc.) 462.

(*x*) 46 & 47 Vict. c. 49.

a suit for the perpetuation of testimony by the Legitimacy Declaration Act (y).

Although actions in the nature of bills to perpetuate testimony have remained unaffected in principle by the Judicature Acts, bills for discovery, on the contrary, which were formerly analogous in many respects thereto, and which formed a conspicuous feature in equitable jurisdiction, have been rendered completely obsolete by the present procedure. It has been, therefore, deemed unnecessary here to discuss them. A study of the Orders under the Judicature Acts, in particular of Order XXXI., in any of the recognised hand-books thereto, will supply ample information as to the present means of attaining the ends formerly sought by bill in Chancery.

Bills for
discovery
obsolete,

Again, it is now scarcely necessary to do more than mention the bills to take evidence *de bene esse*, which once occupied a useful and important place in the auxiliary jurisdiction of equity. The purpose of these bills was to take the testimony of persons resident abroad. They could only be brought while an action was then depending: but they were available as well for a person out of as for one in possession; in both these respects differing from bills to perpetuate testimony (z). Ample powers of a similar nature were, however, long ago conferred upon the Courts of law (a), and at present such matters fall entirely within the province of Procedure, and consequently beyond the scope of this work (b).

and also bills
de bene esse.

(y) 21 & 22 Vict. c. 93; see *Re Stoer*, 9 P. D. 120.

(z) *Angell v. A.*, 1 Sim. & St. 83.

(a) 13 Geo. III. c. 63, s. 44; 1 Will. IV. c. 22, s. 1.

(b) See O. XXXVII. rr. 1—5; *Llanover v. Homfray*, 19 Ch. D 224; *Bidder v. Bridges*, 26 ib. 1.

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
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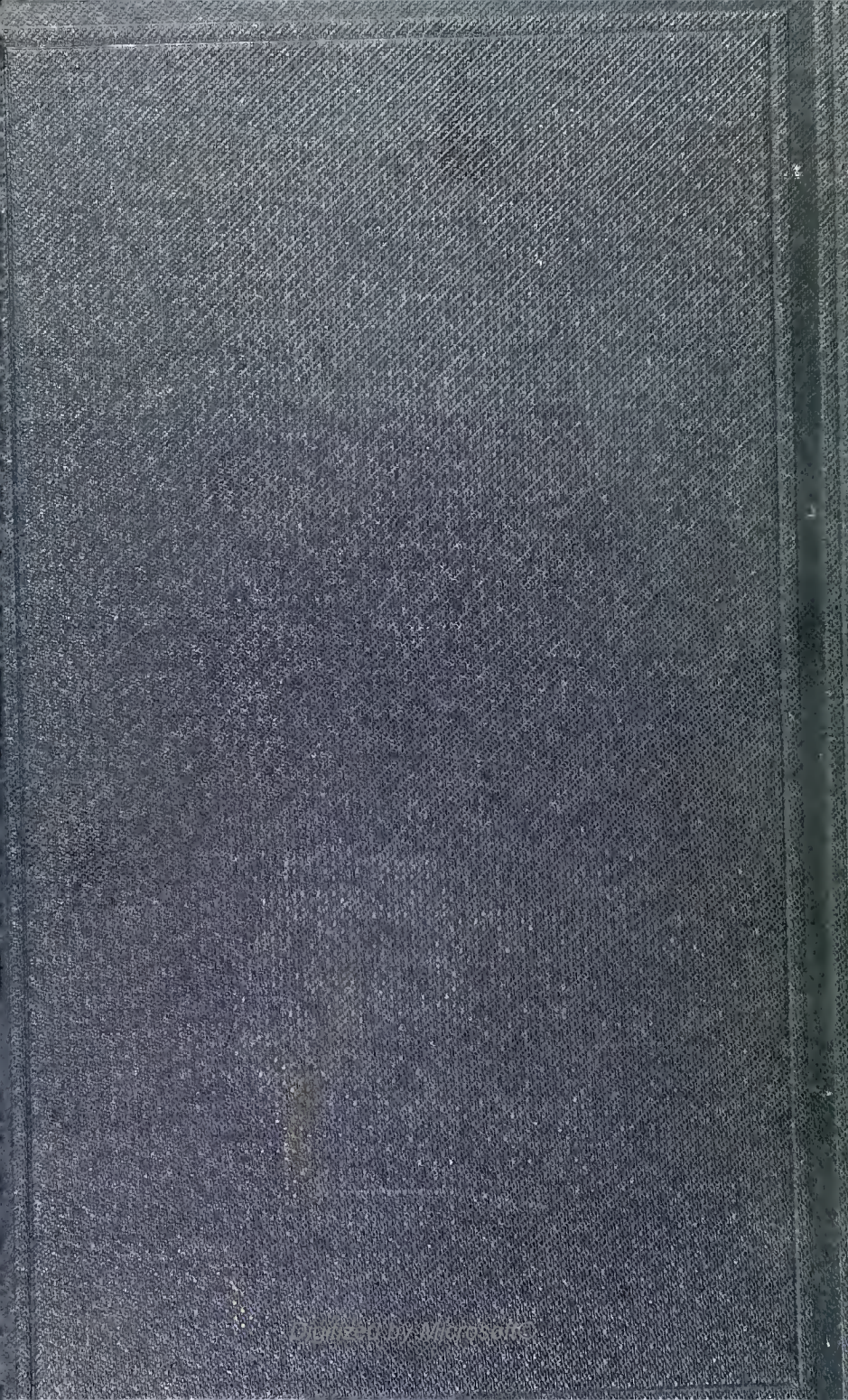
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